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Supreme Court of the United States.

OCTOBER TERM, 1908.

Nos. 962-962.

JAN 16 1909

SOUTHERN PACIFIC COMPANY, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE PACIFIC RAILROAD COMPANY and SOUTHERN CALIFORNIA RAILWAY COMPANY,

Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION.

SOUTHERN CALIFORNIA RAILWAY COMPANY,

Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION ET AL.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION ET AL.

SANTA FE PACIFIC RAILROAD COMPANY,

Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION ET AL.

SOUTHERN PACIFIC COMPANY,

Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE SOUTHERN PACIFIC COMPANY.

R. S. LOVETT,
MAXWELL EVARTS,
Of Counsel for Southern Pacific Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Nos. 158–162.

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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Statement.

The orange-producing lands of California are in the southern part of the State. There are in all about 88,000 acres, 27,000 of which are tributary to the lines of the Atchison, Topeka and Santa Fe System, 27,000 of which are tributary to the lines of the Southern Pacific Company, and the remaining 34,000 acres are served by both lines jointly (Record, p. 946). As a result of this equal physical division of the orange lands between the lines of the Southern Pacific and Atchison Systems, these roads have for years carried about the same amount of oranges. As was said by the Interstate Commerce Commission in its opinion (Record, p. 67):

> "Oranges, lemons, and other citrus fruits in southern California are grown in localities reached by the Southern Pacific and Santa Fe systems in such volume as to produce naturally about equal proportions along each line."

The Santa Fe, however, the mileage of which in the orange country is 328 miles as against 354 miles, the mileage of the Southern Pacific (Record, p. 286), has usually carried a few hun-

dred carloads a year more than the Southern Pacific. Sometimes as much as a thousand cars a year more (Record, p. 137). There is no rate cutting between the Southern Pacific and the Santa Fe in this orange traffic, and there has never been. The two roads have acquiesced in the fact that the natural physical division between them of the territory served ought naturally and properly to determine what each should carry, provided there was proper service furnished by each line. The competition, therefore, between the two roads for the orange traffic has been in the furnishing of facilities and the rapidity of transportation (Record, pp. 198, 960, 962).

Prior to January, 1900, oranges were carried in refrigerator and ventilator cars owned and furnished by private car lines and the right to route such oranges beyond the terminals of the initial carriers was sold by the shippers to such private car lines (Record, pp. 122, 803, 804, 818, 829, 833, 842, 852, 865, 890, 891 and 918). The terminals of the Southern Pacific were at Ogden and El Paso. The Atchison terminal was at Chicago. The price paid by the car lines was obtained from the eastern railroads in the fol-

lowing manner: an eastern road would arrange with a car line that in consideration of the latter routing its oranges over its road it would pay to such car line an excessive mileage per car, viz.: instead of the usual mileage of three-fourths of a cent per mile, a mileage of a cent or a cent and a half per mile (Record, p. 890).

The private car lines believed that they were not subject to the provisions of the Interstate Commerce Act and therefore boldly demanded this rebate out of which they would pay a small amount to the shipper and retain for themselves the larger part thereof. Sometimes the car lines pocketed it all. This rebate amounted at times to $35 a car. The petitioners in the original proceedings in this matter before the Interstate Commerce Commission had always demanded and obtained this rebate prior to January, 1900. One of the petitioners (the Southern California Fruit Exchange) was found by the Commission to have received in rebates $174,491 in four years (Record, p. 66).

The practice of paying rebates by the car lines increased very rapidly and the eastern connections of the appellants were engaged in bidding against each other for the orange business, the routing of

which was determined by the private car lines, solely by the amount which they could exact from the eastern lines therefor (Record, p. 896). The business had become such that there was no money in it for the eastern carriers. They continued to pay the rebates simply in the hope that matters would some time adjust themselves, and upon the principle that it was for their interest to still have a part of the business when such adjustment did occur (Record, pp. 917 and 918). The payment of rebates was confined entirely to the citrus fruit business. No other character of freight exacted or demanded the payment of rebates (Record, pp. 898 and 931). The situation as to the orange business was not unlike that which prevailed on all the railroads prior to the enactment of the Interstate Commerce Act, and was a situation intended to be cured and prevented by that act.

While the Southern Pacific was not paying and never did pay any rebates upon this traffic (Record, p. 917), yet the conditions resulting from this improper method of doing business were onerous and objectionable in many ways, inasmuch as the routing was determined entirely by the amount yielded to the car lines by the

eastern carriers (Record, p. 896). The fitness of such routes to do the business, the quickness with which the cars were returned to California, and the prompt payment of claims had nothing to do with the determination of what roads should carry the oranges beyond the terminals of the initial carriers.

The railroads paying the rebates objected as much to the practice as did the other parties concerned. The producers and growers of the oranges received little or no part of the rebates. The shippers (who in nearly every instance were not producers) sold their routing for what they could get out of the car lines, and the private car lines divided with the shippers the rebates received from the eastern railroads usually in the form of excessive mileage.

It was a complex and difficult situation, and the question which presented itself to the carriers engaged in this business was how they could best prevent this rate-cutting and giving of rebates. It was obvious that the routing of the oranges was a matter of small importance to the shipper, as he was willing to sell such privilege for the uncertainty of receiving a portion of the amount collected by the car lines from the

eastern connections. The only interest in routing which the shipper could possibly have was the right to divert the cars in transit from one market to another, and the right to have the cars enter their final destination on the line affording the best facilities for marketing the oranges. Having these points in mind, the initial carriers (the Southern Pacific Company and the Santa Fe system) and their immediate connections held a conference in San Francisco on the 6th and 7th of October, 1899, in which special consideration was given to this citrus fruit traffic, and it was determined that the exercise by the initial carriers of the right of routing beyond their own terminals which had always been reserved by them in their tariffs (Record, p. 62) would probably break up the rebate system which had grown up so rapidly and had become such a burden, and that it would make no real or substantial change in the relation of the shippers to their freight. Therefore in pursuance of such determination, the following circular letter was prepared and sent to all the eastern lines (Record, p. 875):

"Copy for information of Mr. E. Chambers, Indexed, 8593.

Representing

SOUTHERN PACIFIC CO. RIO GRANDE WESTERN RY.
UNION PACIFIC R. R. TEXAS & PACIFIC RY.
SANTA FE SYSTEM.

SAN FRANCISCO, Oct. 9, 1899.

CITRUS FRUIT TARIFF.

DEAR SIR:

At a conference held in this city on the 6th and 7th inst., at which the California terminal lines and their direct connections were represented, special consideration was given to citrus fruit tariff, and in order to effectively promote the observance of the interstate commerce act, thereby conserving the lawful interest of all concerned in the traffic, it was

Resolved, That current citrus fruit tariff be canceled November 14th, 1899, and taking effect November 15th, 1899, Agent Countiss publish for each of the roads represented at this conference, a tariff in connection with specified routes, comprising roads that give express assurance that they will not deviate from the rates provided therein, directly or indirectly, by any method or device, whether in conjunction with carriers, shippers, consignees or car lines.

In full assurance of their good faith, each road, in consideration of being made a party to the new tariff, shall give its assent to the cancellation of said tariff, so far as its own road is concerned, in event that rates are not absolutely maintained by it as contemplated in foregoing.

Further, said tariff shall bear the following lawful provisions:

'In guaranteeing rates, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving guaranty.'

May I ask that you promptly advise me as to whether you will give the assurances which, under the above resolution, are requisite to representation to your company in the proposed new tariff, and oblige

Yours very truly,

R. H. COUNTISS,

Agent.

General Note.—Indefinite or evasive responses will be construed as indicating an unwillingness to give the desired assurances."

Subsequently and on the 19th day of December, 1899, Wm. Sproule the freight traffic manager of the Southern Pacific Company and W. A.

Bissell, assistant traffic manager of the Atchison system, sent a joint telegram to the eastern lines as follows (Record, p. 869):

"12/19/99.

Wm. Sproule, D. H., 7168.
W. A. Bissell, D. H., 8741.

E. F. Cost, C. C. C. & St. L. Ry., Cincinnati, Ohio.

James Webster, Nickel Plate, Chicago, Ills.

Sam P. Shane, Erie R. R., Cleveland, Ohio.

Geo. B. Reeve, Grand Trunk Ry., Montreal, Que.

G. J. Grammer, L. S. & M. S. Ry., Cleveland, Ohio.

B. B. Mitchell, Michigan Central, Detroit, Mich.

E. L. Dawson, Pennsylvania Co., Chicago, Ills.

B. D. Caldwell, D. L. & W. Ry., New York City.

H. H. Kingston, Lehigh Valley, New York City.

S. B. Knight, Wabash R. R., St. Louis, Mo.

A. P. Bigelow, B. & O. R. R., Chicago, Ills.

A. S. Crane, Fitchburg R. R., Boston, Mass.

H. B. Chapin, Boston & Albany Ry., Boston, Mass.

W. F. Berry, Boston & Maine, Boston, Mass.

S. T. McLaughlin, B. & O. S. W., Cincinnati, Ohio.

On and after January first, nineteen hundred, California terminal lines have made arrangements for routing the citrus fruit traffic from California through to final destination. Have further arranged that no diversions shall be made without consent of terminal lines and have notified the car lines interested, who are agreeable to the changed conditions. From this action you will see that if any special arrangements have been made by any lines east of Chicago, or St. Louis looking to the control of the business either through car lines, shippers or any other source, that the results expected cannot be obtained thereby, and we would respectfully suggest their cancellation. This result you will see is in line with giving the legal protection contemplated to all shippers alike and protecting your interests in the traffic at full tariff rates.

WILLIAM SPROULE.
W. A. BISSELL."

To this joint telegram many replies were sent, but the general feeling with which the joint telegram was received is perhaps as well shown by the telegram received from the Cleveland, Cincinnati, St. Louis and Chicago Railway Company (Record, p. 873), which reads as follows:

"CLEVELAND, CINCINNATI, CHICAGO &
ST. LOUIS RY. CO.
E. F. COST, Freight Traffic Manager.

CINCINNATI, OHIO, Dec. 20, 1899.
(Office of Assistant Traffic Manager.)

Mr. W. A. Bissell, assistant traffic manager,
Santa Fe route, San Francisco, Cal.
Mr. William Sproule, freight traffic manager,
Southern Pacific Co., San Francisco, Cal.
Gentlemen:

Your telegram of December 19th in relation to the routing of citrus traffic from California received.

We are indeed glad to get this information as it will protect the revenues of the eastern roads against the undue competition of the several refrigerator lines who have heretofore practically sold their business at auction.

I think you are deserving of a vote of thanks from the Central Freight Association roads.

Very truly yours,
E. F. COST."

A special citrus fruit tariff was prepared and filed with the Interstate Commerce Com-

mission, effective November 15, 1899 (Record, p. 456) which contained the following clause:

> "In guaranteeing the through rate named herein the absolute and unqualified right of routing beyond its own terminals is reserved to initial carriers giving guaranty."

This tariff was superseded by another special citrus fruit tariff, effective January 1, 1900 (Record, p. 466), and subsequently by other similar special tariffs, and the clause in regard to the right of routing read in the later tariffs, as follows (Record, p. 987):

> "The joint tariffs and rates herein named are made and entered into upon the express condition that the initial carrier shall have and exercise the sole and exclusive right of routing all shipments under said joint rates beyond its terminus as well as upon the other conditions, provisions and stipulations hereinafter set forth."

After the new routing system was adopted, circulars were sent to the various agents of the initial lines in which the delivering lines preferred by shippers were expressly indicated (Record, pp. 785, 790), and a special provision was inserted to the effect that wherever delivering

line instructions conflicted with specific routings, the delivering line instructions should prevail. This direction was as follows (Record, p. 784):

> "NOTE 2. 'Specific routings' or 'delivering line instructions' must be adhered to. Should they conflict 'delivering line instructions' will prevail."

There was also in this routing circular a provision in regard to diversions which the testimony shows were always freely permitted whenever asked for. This provision reads as follows (Record, p. 786):

> "Diversions in transit will be permitted only by consent of initial carrier who will thereupon designate in the routing when diversion necessitates change therein."

Special matters of interest to special shippers were also covered by these routing circulars as appears on p. 795 of the Record where the agents of the Southern Pacific Company were especially directed not to route any fruit shipments made by a particular shipper by a certain line which for some reason was objectionable to that shipper.

> "NOTE 4. Do not route any citrus fruit shipments made by A. G. Stearns via the

St. Louis & San Francisco railroad. Please pay particular attention to this."

The routing circular referred to is the circular of latest date printed in the record (Record, pp. 785-796). The others are substantially in the same form and directly precede it in the record.

Shortly after the exercise of the right of routing by the initial lines under the tariff of January 1, 1900, it was arranged by the initial carriers that the shippers should have the right to instruct through what cities or markets they desired the cars to pass in transit to destination. The purpose of this privilege is obvious, and was given to enable the shipper to sell the car at some point prior to its final destination, if opportunity should offer. This instruction was given to the Southern Pacific agents on the 27th of February, 1900, and was as follows (Record, p. 801):

"LOS ANGELES, CAL., Feb. 27, 1900.

To all agents in California south of Mojave and Elwood:

Gentlemen: It has been decided to allow shippers the privilege of placing on shipping orders or other documents covering ship-

ments of citrus fruit, their preference of certain cities or markets through which they desire cars to pass, providing there [are] two or more lines of railway competing for traffic between each of the various points specified.

You may, therefore, accept on shipping orders, in accordance with the above, the following notation:

'Would prefer this car pass through ———' naming points.

Should any point be indicated, not served by competing lines, you will please request shippers to omit same.

Yours truly,

G. W. LUCE,

A. G. F. & P. A., So. Pac. Co."

It appears from the testimony that the routing of the citrus fruit after January 1, 1900, was substantially and to all intents and purposes over the same lines upon which it was routed prior to that time. The only difference being that round-about roads were eliminated and the most direct routes used (Record, p. 879). It is also shown by the evidence that the shipper after January, 1900, had the right of diversion as fully as ever (Record, pp. 136, 138 and 139, 911, 913 and 926), and had the further privilege of select-

ing the cities and markets through which his cars were to pass, which is equivalent, so far as practical purposes are concerned, to the right to route the freight (Record, p. 801). From the point of view of the shipper his position except as to rebates was substantially the same as it was before. This is conceded by the shippers (Record, pp. 253 and 261, 813 and 814), and the only claim made by them is that the time of transit since 1900 is not as quick as it was before.

Time is of course an important element in this traffic although as one of the shippers testified oranges ought to keep perfectly well for three to five weeks after delivery in eastern markets (Record, p. 857). It also appears from the testimony that the average delay in unloading the cars at destination, which is due solely to shipper and consignee, is at Chicago, for instance, about six days for each car (Record, p. 139). The explanation however of the difference in time of transit, which is perhaps two or three days longer since 1900, than it was before, is the heavy congestion on the railroads of the country and the inability to obtain equipment (Record, pp. 205, 911, 925 and 926). The citrus fruit traffic has not been delayed in pro-

portion to other traffic. It is still as it has always been a preferred traffic on the road, being given the right of way over everything except passenger traffic (Record, p. 925). This delay by reason of congestion of the railroads the witnesses say, would have been greater under the old system of routing prevailing prior to January, 1900, than it is under the present system (Record, p. 926), and the routing by the railroad has had nothing whatever to do with prolonging the time of delivery to eastern markets. This is substantially acquiesced in by the witnesses for the complainant.

The right to route freight was exercised by the railroads in regard to citrus fruit traffic simply for the purpose of destroying the rebate system. The judgment of the railroads was confirmed by the result and the practice of giving rebates and so discriminating against shippers was entirely done away with by the adoption of the routing by the initial carriers. The rebate evil, which had demoralized the orange traffic, absolutely ceased and of course left the car lines and those of the shippers, who had profited the most by it, in a dissatisfied condition and soon after the exercise by the initial lines of the right

to route the orange traffic and before the new plan could be given a fair trial, a petition was filed with the Interstate Commerce Commission by the Southern California Fruit Exchange, verified the 24th day of February, 1900 (Record, p. 35), and another petition by the Consolidated Forwarding Company, verified the 26th day of February, 1900 (Record, p. 13). These two companies had received large rebates, the Southern California Fruit Exchange having received about $175,000 in four years (Record, p. 66). It was very evident that the motive of the proceeding brought by these orange shipping corporations was their feeling against their competitor the Earl Fruit Company and the Continental Fruit Express, which owned private cars used upon the Atchison System under a five year contract which had some time yet to run. That is to say the Southern California Fruit Exchange and the Consolidated Forwarding Company felt that their competitor was still receiving rebates, while they were not, and the real motive back of the proceeding, as the President of the Southern California Fruit Exchange frankly states, was the fact that they were not getting rebates and wanted them.

After explaining that he had been receiving rebates for years, Mr. Naftzger, the president of the petitioner, in the original proceeding before the Interstate Commerce Commission, testifies as follows (Record, p. 806):

> "MR. HERRIN: You have paid the full tariff since January 1st, have you not, this year, refrigeration tariff?"
>
> "MR. NAFTZGER: I think so."
>
> "MR. HERRIN: Have you got anything back?"
>
> "MR. NAFTZGER: No sir."
>
> "MR. HERRIN: *Isn't that the trouble in this matter?*"
>
> "MR. NAFTZGER: *That is one of them.*"

The railroads answered fully the petitions and the proceeding was tried before the Interstate Commerce Commission. The whole controversy turned on the one question of whether the carrier had the right to determine the routing of the oranges to the exclusion of the exercise of such right by the shipper. The Commission came to the conclusion that the routing by the initial carriers was a violation of the Interstate Commerce Act and held at page 77 of the Record, as follows:

> "Our conclusion is that the practice of the defendant carriers in denying to the shippers the use of their transportation facilities by the established routes is in violation of the statutes, and, in its application by the defendants to the traffic in question, subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvantage, and gives to the carriers an undue and unreasonable preference and advantage."

From this conclusion, the Chairman of the Interstate Commerce Commission dissented in a very able opinion given at page 77 of the record. That this question of whether the routing of the oranges by the initial carriers was an undue prejudice to the shippers was the sole question considered and determined by the Interstate Commerce Commission is shown by the conclusion of their opinion in which it is stated at page 77 as follows:

> "The evidence is unsatisfactory as a basis for definite conclusions upon the following questions: Whether the defendant carriers pool their citrus fruit traffic or divide the earnings therefrom. Whether the blanket rate of $1.25 per hundred pounds upon

> oranges and other citrus fruits from southern California to points on and east of the Missouri river, and the minimum carload weight of 26,000 pounds are unjust or unreasonable under the provisions of the statute. Whether the statute applies to the charges for refrigerating, and if so whether those refrigerating charges are unjust or unreasonable. These questions are retained by the Commission for further hearing and investigation."

It is further apparent from reading the dissenting opinion of Mr. Knapp, Chairman of the Commission, that the question of prejudice to shippers from the routing by carriers of the oranges was the only one considered.

An order was entered by the Commission in conformity with their opinion directing the initial lines to

> "cease and desist from and after the 20th day of June, 1902, from maintaining and enforcing a rule or regulation whereby shippers of oranges, lemons or other citrus fruits . . . are denied the right of designating for the transportation of their said property and having such property transported over any of the defendants' established and pub-

lished joint or continuous lines or routes" (Record, p. 84).

Upon the initial lines failing to comply with the order of the Commission, a proceeding was begun under the Interstate Commerce Act in the United States Circuit Court for the Southern District of California, in aid of and to enforce the order of the Commission (Record, p. 8). After alleging the facts which have been here stated, the complaint of the Interstate Commerce Commission proceeds as follows (Record, p. 11):

> "XI. And complainant charges that the said rule of the defendants and practice thereunder, which they are required by said order, Exhibit H hereto, to cease and desist from enforcing and maintaining, are in violation of the act to regulate commerce, in that, among other things, said rule and practice subject shippers of oranges, lemons, and other citrus fruits from points in southern California to points on and east of the Missouri River, and to other eastern destinations, to an undue or unreasonable prejudice or disadvantage, and, also, in that it subjects the traffic in oranges, lemons, and other citrus fruits between said points to an undue or unreasonable prejudice or disad-

vantage, and gives the said defendants an undue or unreasonable preference or advantage."

This proceeding in the Circuit Court was begun prior to the Elkins Act of February 11, 1903, giving the right to commence a proceeding directly in the Circuit Court, and was a proceeding in aid of and to enforce the order of the Commission and not a new proceeding. It was brought simply to enforce the order and to have determined the one question of whether the routing of freight by a carrier against the wishes of a shipper was an undue prejudice to such shipper, and the complaint of the Interstate Commerce Commission was drawn upon that theory. The important question in this controversy, the one in which the government, the carrier and the shipper are all interested, is whether the initial carrier can insist, as a condition of its guaranteeing a through rate to a point on its connecting lines, that it shall have the right to route the freight offered beyond its own terminal, without violating the Commerce Act, in thereby creating an undue and unreasonable discrimination and prejudice against the shipper. There is no other question in this case, and the insistence

on the part of counsel for the Interstate Commerce Commission that this proceeding is not one to enforce the order of the Commission, but a new proceeding under the Elkins Act passed subsequent to its commencement, and his desire to bring into this case questions which the Interstate Commerce Commission declined to pass on for the reason that the evidence "is unsatisfactory as a basis for definite conclusions" is evidently due to a feeling upon his part that the main question upon which all are interested in obtaining a decision, may go against him.

The railroads filed demurrers to the bill of complaint of the Interstate Commerce Commission. The demurrers were argued before Judge WELLBORN and were overruled.

Thereafter answers were filed by the Southern Pacific and the Atchison system, further evidence was taken, and the case was submitted to Judge WELLBORN. He was apparently of the opinion that the special citrus fruit joint tariff containing a provision as to routing by the initial carriers in consideration of the through rate provided therein was in effect a pool in violation of the fifth section of the Interstate

Commerce Act and decided the case in favor of the Commission.

At page 1044 of the Record he says in his opinion, after quoting from the decision of this Court in United States v. Freight Association, 166 U. S., 290, as follows:

> "No such situation, it should be borne in mind, was before the court then, as is here presented, namely, a traffic pool, or more specifically a contract for the distribution of freight between different and competing railroads by arbitrary routings of the initial lines, regardless of the wishes of shippers."

Further on at p. 1045, he says:

> "After careful consideration of the subject, I am of opinion that any contract, agreement or combination between different and competing railroads, whereby the volume or quantity of freights each or any shall receive for transportation is to be determined by or through any conventional means or agency, which was intended to, and does suppress competition either in rate or service or competition directly addressed to shippers, is a traffic pool, within the meaning of section 5 of the commerce act, and, that the routing contract here in controversy

does so apportion freights among the defendants' eastern connections and is essentially such a pool."

If we understand this decision rightly, Judge WELLBORN has held that there was an agreement between the initial carrier and the connecting carriers as to the distribution of freight over the eastern lines, to be accomplished by the adoption by the initial carrier of the routing of the freight. To support this conclusion there is absolutely no evidence in the record from beginning to end.

From the judgment entered upon the decision of Judge WELLBORN this appeal has been taken.

Specification of Errors.

The Circuit Court of the United States, for the Southern District of California, erred:

1. In that it did not sustain the demurrer of the appellants to the petition and complaint herein.

2. In that it did not dismiss the complaint and petition herein.

3. In that it did not hold that the Interstate Commerce Commission was not authorized to make the order of June 2, 1902.

4. In holding that the order of the Interstate Commerce Commission of June 2, 1902, was a lawful order.

5. In that it did not hold that the appellants had the right at common law to route through shipments beyond the terminals of their own lines, and that such right was in no way affected by any provision of the Act of Congress commonly called the Interstate Commerce Act and the amendments thereto.

6. In not holding that the appellants were authorized to exercise the right of routing citrus fruit shipments beyond their own terminals under the provisions of the special joint tariff of January, 1900, and the special joint citrus fruit tariffs subsequent thereto.

7. In holding that the routing provision in the joint tariff set forth in the decree below is an agreement and combination for the pooling of freights of competing railroads, or is in any respect in violation of section 5 of the Interstate Commerce Act.

8. In holding that it was authorized to examine into and determine in this proceeding any question or questions beyond those determined by the Interstate Commerce Commission in the

original proceeding brought before it by the petitions of the Southern California Fruit Exchange and the Consolidated Forwarding Company, verified respectively the 24th day of February, and the 26th day of February, 1900.

9. In not holding that the proceeding brought before it was simply in aid of and to enforce the order of the Commission of June 2, 1902, and that no matters were before it other than those considered and determined by the Interstate Commerce Commission.

10. In holding in effect that the proceeding before it was a new proceeding and not simply a proceeding to enforce the order of the Interstate Commerce Commission of June 2, 1902.

FIRST POINT.

The Court below was without jurisdiction to hold that the joint tariff referred to in its final decree was a violation of the pooling clause of the Interstate Commerce Act. The proceeding in the Circuit Court was in aid of and to enforce the order of the Interstate Commerce Commission. While a proceeding de novo in the sense that it was open to the lower Court to take further testimony and to determine for itself questions decided by the Interstate Commerce Commission, yet its jurisdiction was limited to the determination of whether the order of the Interstate Commerce Commission was lawful, and not whether it would have been possible to make a lawful order in the case. If the Court found the order lawful, then its duty was to enforce it. If it found the order could not be upheld for the reasons given therefor by the Interstate Commerce Commission, then its duty was to dismiss the petition, and it was without power to determine that a lawful order could have been entered upon grounds other than those considered by the Interstate Commerce Commission.

By the order of the Interstate Commerce Commission, the appellants were required to cease and desist from enforcing a rule whereby shippers of oranges and other citrus fruits were denied the right of routing beyond the terminals of the appellants. The order itself does not give the reasons upon which it is based. It is therefore necessary to examine the opinion of the Commission to determine whether the order was a lawful order or not. From the opinion it appears that the ground for making the order is that the exercise of routing by the initial carriers subjects the owners and shippers of the oranges to "undue, unjust and unreasonable prejudice and disadvantage and gives to the carriers an undue and unreasonable preference and advantage" (Record, p. 77). This is the basis and reason for the order, and the only question presented to the court below was whether the exercise of such routing privilege did create a prejudice and disadvantage to the shippers and give the carriers an unreasonable preference and advantage in violation of the Interstate Commerce Act. If so, then the order was lawful and was properly upheld. If it did not, then the petition should have been dismissed by the Circuit Court.

In the petition of the Interstate Commerce Commission filed to enforce the order of June 2, 1902, the whole ground of the complaint against the railroad companies was that the routing rule and its enforcement subjected the shippers to an undue and unreasonable prejudice and disadvantage and gave to the railroad companies an undue and unreasonable preference and advantage. This clause of the complaint or petition is as follows (Record, p. 11):

> "XI. And complainant charges that the said rule of the defendants and practice thereunder, which they are required by said order, Exhibit H hereto, to cease and desist from enforcing and maintaining, are in violation of the act to regulate commerce, in that, among other things, said rule and practice subject shippers of oranges, lemons and other citrus fruits from points in southern California to points on and east of the Missouri River, and to other eastern destinations to an undue or unreasonable prejudice or disadvantage, and, also, in that it subjects the traffic in oranges, lemons, and other citrus fruits between said points to an undue or unreasonable prejudice or disadvantage, and gives the said defendants an undue or unreasonable preference or advantage."

From this pleading, it is clear that the Interstate Commerce Commission when it brought this proceeding in the Circuit Court understood that it was simply a proceeding in aid of the order of June 2, 1902, and that no matters were to be considered by the Court beyond the question whether the order was a lawful one for the reasons given by the Interstate Commerce Commission for the making thereof. The testimony was taken before the Court below upon this theory. It was understood that the proceeding in the lower Court was a *de novo* proceeding only in the sense that further testimony could be taken upon all questions determined by the Interstate Commerce Commission, and that no further matters were to be raised or considered beyond those considered by the Commission. That is to say, the duty of the Court below was to decide the single question of whether the order as entered was a lawful order, and not whether it would have been possible for the Interstate Commerce Commission to have entered an order on other grounds which would have been lawful and proper. It will not do for the Circuit Court in a proceeding of this character to say that the order as entered was not lawful and that the Interstate Commerce

Commission had not the power to make such an order for the reasons given by it, but that there were in the opinion of the Court other grounds and reasons which would sustain such an order, and which had been developed in the proceeding before it. To do this would in effect deny to the railroad companies their day in court. They came in to the Circuit Court to try the issue raised by the pleadings. That issue was clearly defined and was whether the shippers of oranges had been prejudiced by the exercise by the initial carriers of the right of routing beyond their own terminals. This was the single issue presented by the pleadings, and the carriers were justified in supposing that no other question was properly before the Court; that other matters than the issues raised by the petition and answers were not to be considered by the Circuit Court in a proceeding brought to enforce an order of the Commission and that it was not open to the Court below to determine that the routing rule was not a discrimination against the shippers in violation of the Intestate Commerce Act, and did not create any undue prejudice against them, but was a pooling agreement in violation of the fifth section of the Act. The decisions of the

courts have invariably been to this effect, and if there had been the slightest doubt upon the point then, of course, the railroads would have introduced evidence upon this latter question and shown that no such pooling combination or agreement ever did in fact exist.

In an ordinary proceeding a litigant is expected to introduce evidence in his behalf only upon the points as to which an issue has been raised by the pleadings, and the Court in deciding the case passes only upon the questions at issue and does not determine the case upon grounds not raised by the pleadings or considered upon the trial, and it is certainly a somewhat novel and unusual proposition to say that in such a complex and difficult case as the present one, involving large matters of immense importance to the public and all the railroads of this country, the proceeding was to be disposed of by what might be called a snap judgment upon a point which was not raised by the pleadings and as to which the attention of the appellant was in no way properly called at the time of the trial. That is to say, the ordinary rule should certainly be applied in a proceeding of such magnitude as the present one, and before deciding this controversy upon a

point in no way considered by the parties to be before the Court, the petition should be dismissed with leave to bring a new case in which the point now made by the Court could be raised in the pleadings and tried out at length.

Upon finding that the order as entered was not a lawful order and could not be sustained upon the grounds given therefor in the opinion of the Interstate Commerce Commission, it was the duty of the Circuit Court under the decisions, as we understand them, to dismiss the proceeding without prejudice to a new proceeding to be begun before the Commission in which the pooling charge could be tried, and a full examination of that question made.

To put it in another way, the Circuit Court did not have power to find that the reasons given for the order by the Interstate Commerce Commission were wrong, but that such Commission could have given reasons which would have made the order a lawful order and that therefore the Court, as a Court of Equity, could determine the matter without sending it back for further trial.

There are many authorities which discuss the jurisdiction of the Circuit Court in a proceeding brought to compel obedience to an order of the

Interstate Commerce Commission, and all of them seem to hold that such a proceeding is not a new one, in which all questions can be raised in any way relating to the subject-matter of the complaint, but that the jurisdiction of the Court is limited to the question of whether the railroads have violated a lawful order of the Commission, and whether such order is lawful or not is to be determined by the grounds given by the Interstate Commerce Commission for making it. The Court is not to decide whether the appellants have violated an order which the Commission *might* have lawfully made, but whether they have violated one which *was* lawfully made. This distinction is well brought out by Judge WALLACE in the case of *I. C. C.* vs. *D. L. & W. R. Co.*, 64 Fed. Rep., 723, where he said:

> "The Court cannot substitute for an order actually made one such as the Commission might or should have made, or such as the Commission was entitled to but failed to make. This court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected

to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made. It is not a violent presumption that if the order had been in terms one such as the Commission intended to make, the respondents would have contested its propriety and refused to obey it."

In *Detroit G. H. & M. Ry. Co.* vs. *I. C. C.*, 74 Fed. Rep. 803, 841, the Circuit Court of Appeals for the Sixth Circuit, held as follows:

"Whatever may be the plenary power of a court of equity to command at the suit of those who are injured, the performance of any duty arising out of a contract or statutory obligation, the jurisdiction it was exercising here is strictly special and statutory, and is limited, as all special jurisdiction is, to the precise power conferred by the interstate commerce act, which is only to compel obedience to the 'lawful order' of the commission. It has not been granted any broader power to exercise the authority of the commission itself by substituting a new regulation or order of its own, or modifying that which the Commission has given. It is purely an auxiliary jurisdiction. * * *

> The powers of the Commission being administrative, and not judicial, the ancillary and supplemental judicial jurisdiction is necessarily limited to the purpose of its creation, and can go no further than to grant or refuse compulsory obedience to the lawful orders of the Commission, and as it makes them."

In *I. C. C.* vs. *L. & N. R. Co.*, 73 Fed. Rep., 409, 413, it was said:

> "It is conceded by counsel for both sides of the case that the Court, in its power and jurisdiction over the matter, is limited to an approval or disapproval, and to the enforcement or refusal to enforce the order of the commission as a whole or in part just as made by the Commission, and that the Court is without power or authority to treat the case as one originally instituted in this Court, and make an order or decree of its own, or to modify the order of the Commission for the purpose of making it conform to the opinion of the Court in case the Court should entertain a different opinion from that of the Commission; and such would seem to be the proper construction of section 16 of the act."

In *Farmers' Loan and Trust Co.* vs. *Northern*

Pac. Ry. Co., 83 Fed. Rep. 249, 267, the Court said:

> "The proceeding is founded upon section 16 of the interstate commerce law, and has a specific object, viz., to enforce a decision and order of the interstate commission. * * * In such a proceeding the court has no general power to adjust differences between the litigants, or to correct abuses in the conduct of its business by a railroad company; and unless a valid order has been made by the Interstate Commerce Commission, and violated by the railroad company, no relief can be granted to the petitioners."

If we read these authorities correctly then the Circuit Court in a proceeding to enforce an order of the Interstate Commerce Commission has but one question before it, viz.: Was such order a lawful order, and to determine that one question, it must decide whether the grounds given by the Interstate Commerce Commission for that order were sound. If they were, then the order must be enforced; if they were not, then it is not the duty or within the jurisdiction of the Court to find sound reasons for the order, but it must dismiss the petition. Its duty is fulfilled when it

determines that the order as entered for the reasons given for its entry cannot be sustained, and the proceeding in the Circuit Court is not deemed to be a new proceeding, but a proceeding in aid of the administrative order of the Interstate Commerce Commission, which is a *de novo* proceeding only in the sense that the questions determined by the Interstate Commerce Commission can be examined at length on additional evidence introduced before the Circuit Court.

It is therefore respectfully submitted that the court below was without jurisdiction to hold that the joint tariff referred to in its final decree was in violation of Section 5 of the Interstate Commerce Act and that such court was limited in its jurisdiction to the question whether the order of the Commission as entered was lawful, that is to say whether it could be upheld for the reasons given by the Commission for making it.

SECOND POINT.

At common law the appellants could route through freight beyond their own terminals and they have not been deprived of such right by the Interstate Commerce Act.

It will no doubt be conceded that in the absence of any statute on the subject a carrier when it undertakes to carry freight beyond its own terminals has the right to select the route over which the freight shall be shipped. The principle is that a carrier when it agrees to transport freight beyond its own line does so not as a common carrier, but under an independent contract governed by the same rules that any contract is controlled by. Under the common law, therefore, it is clearly open to a carrier, which has contracted to carry beyond its own lines, to select the agency through which to perform the contract made by it with the shipper.

This proposition is undisputed and was before this Court in the case of *Atchison, Topeka & Santa Fe R. R. Co.* vs. *Denver & New Orleans R. R. Co.*, 110 U. S., 667. In this case it appeared that the Constitution of Colorado provided that "all individuals, associations and corporations

shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employee thereof shall give any preference to individuals, associations or corporations in furnishing cars or motive power." A bill in equity was filed by the D. & N. O. R. R. Co. to compel the Atchison Company to unite with the D. & N. O. Company in forming a through line of transportation through and from Denver over the D. & N. O. road, with all the privileges as to exchange of business, etc., that were granted to the Denver & Rio Grande Railroad Company operating a road parallel to the D. & N. O. Company. A final decree was entered for the complainant, from which an appeal was taken to this Court, and the case was reversed and the bill ordered dismissed without prejudice. In the opinion at page 680, it was said by Chief Justice WAITE, as follows:

> "At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go be-

yond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."

It is to be noticed that the provisions of the Constitution of Colorado in reference to undue and unreasonable discrimination are not dissimilar to the provisions of the Interstate Commerce Act in that regard.

This principle was again approved in the late case of *Louisville, &c., R. R. Co.* vs. *West Coast Naval Stores Co.*, 198 U. S., 483, 497, where it was said, referring to the Atchison case:

"In that case it was held that, although at common law the common carrier was not

bound to carry beyond its own lines, yet it might contract to do so, and in the absence of statutory regulations prohibiting it the carrier might determine for itself what agencies it would employ to continue the transportation, and it was not bound to enter into agreements for each [such] transportation with another because it had done so with one common carrier. * * * The principle stated in the above case is in substance recognized in *Gulf, &c., Ry. Co.* v. *Miami SS. Co.*, 86 Fed. Rep. 407; *Little Rock &c., Ry. Co.* v. *St. Louis &c. Ry. Co.* 63 Fed. Rep. 775, affirming same case in 59 Fed. Rep. 400. The two last cases involved the construction of the Interstate Commerce Act, but they affirm the principle that a common carrier may agree with such other carrier as it may choose, to forward beyond its own line the goods which it had transported to its own terminus."

The case of *Post* vs. *Railroad Co.*, 103 Tenn., 184 (52 S. W., 301), is on all fours with the case at bar. In the Post case, it appeared that shippers of cotton from Memphis, Tenn., to eastern points insisted that they had the right to determine by what routes the cotton should be carried after leaving the terminals of the Rail-

road Company. The only interest of the shippers in the matter was apparently the same as that which the petitioners before the Commission in the present case had, viz.: an interest in rebates, and upon this point the Court said (p. 219):

> "It also clearly appears, so far as this record shows, that the matter of routing cotton is one of indifference to shippers at Memphis, except so far as it is required by the demands of eastern consignees; and it further appears that these demands are made in the interest of the Star Union, a fast freight line operating in eastern territory, having no road of its own, and not entering the city of Memphis over the line of any other road, but proposing to so bill and route cotton at Memphis as to secure its carriage over its own line when it reaches its eastern field of operation. Whether shippers or consignees receive directly or indirectly, any rebates or concessions as a result of shipments over this fast freight line, is the question which complainants refuse to answer, because it might tend to incriminate them; but there is other evidence that by some secret arrangement such rebates are secured. The effort, then,

> resolves itself into one by which eastern consignees seek to create a monopoly in the carriage of cotton by the Star Union line wherever it enters or passes through its territory, and this because of some undisclosed secret arrangement by which either consignees or shippers obtained rebates and concessions not enjoyed by other freight or railroad lines. The courts cannot be used to carry such arrangement into effect."

The Southern Railway Company refused to permit shippers to select the routes beyond its own terminal, and exercised the right of routing itself. A bill was thereupon filed by the cotton shippers praying for a mandatory injunction compelling the Southern Railway Company to route the cotton beyond its terminals over the lines selected by complainants. The case was tried, and a decree for the complainants was entered. From this decree an appeal was taken to the highest court of Tennessee, and the decree of the lower court reversed, and it was held in a very well considered opinion, at pages 214 and 220, that

> "When goods are tendered for shipment to a point beyond the carrier's line, and there are two or more routes equally safe,

prompt and reliable, the carrier cannot be compelled to accept the goods to be carried over one route in preference to another, at the option of the shipper, unless some reason appears therefor; and especially is this so when the carrier shows that in the conduct of its business the use of one route may be advantageous to it, without injury or sacrifice to the interests of the shipper. * * *

"We are of the opinion that upon the main questions as to the right of carrier and shipper to designate the route of through shipments at through rates, all other questions being out of the way, the law is and should be that, in the absence of any sufficient or controlling reason to the contrary, the carrier should have that right."

The question therefore comes to this: What provision of the Interstate Commerce Act (if any), deprives the appellants of the right which they would have at common law, to select the route over which the oranges, which they undertake to carry to eastern points, should be transported beyond their own terminals. There is certainly no specific provision of the Act upon the point.

A majority of the Commission was of the

opinion in the original proceeding that such right of routing was in violation of the Act because its exercise resulted in subjecting the shipper to an undue and unreasonable prejudice and disadvantage, and gave to the carrier an undue and unreasonable preference and advantage. The Court below, however, was apparently unable to follow the reasoning of the Commission, and to see how any shipper was subjected to any prejudice or disadvantage by reason of the selection by the carrier of the agency, which it deemed most desirable, to carry out the contract which it had made to transport the oranges from California points to Eastern points. The Court, therefore, disregarded the decision of the Interstate Commerce Commission and the grounds given therefor, and held that the right of routing was not contrary to the provisions of section third or sixth of the Interstate Commerce Act, as the Commission had held, but was in effect a traffic pool with the eastern lines and in violation of the fifth section of the Interstate Commerce Act.

We have, therefore, two grounds suggested in support of the proposition that the Interstate Commerce Act deprives a carrier of its common law right to route through freight beyond its

own terminals—one by the Commission and the other by the Court. If neither of these appeal to this Court as sound, then we think it safe to assume that no other reason can be given to sustain the position that the Interstate Commerce Act forbids the routing by a carrier of through freight beyond its own terminals. It will, therefore, be necessary to review in detail, first, the decision of the Interstate Commerce Commission, and then, the decision of the Court below.

DECISION OF INTERSTATE COMMERCE COMMISSION.

In the consideration of the decision of the Commission, it is necessary to clearly understand just what this special citrus fruit tariff was. The appellants were under no obligation as common carriers to furnish to the shippers of oranges through transportation therefor from California points to eastern points or to give them especial accommodations. Their duty was entirely fulfilled by the carriage of the fruit to their own terminals, and the delivery thereof to their connecting carriers, charging therefor the full local rates, and only furnishing ordinary cars for the transportation thereof, requiring the unloading of such cars at

their terminals, and the reloading there of the oranges into cars of the connecting carriers. This was the full legal obligation of the appellants to the orange shippers. They, however, agreed with such shippers that if the latter would permit them to route the freight and select the carriers beyond their own terminals they would transport the oranges from California points to eastern points at the low rate of $1.25 a hundred. The consideration of such transportation was not the $1.25 a hundred, but the $1.25 a hundred and the right to route the freight beyond their own terminals. This contract was contained in the special joint tariff filed in November, 1899, and subsequently succeeded by similar citrus fruit tariffs. This provision of the contract between the carriers and the shippers as contained in the joint tariff of May 8, 1903, was as follows (Record, p. 987):

> "The joint tariffs and rates herein named are made and entered into upon the express condition that the initial carrier shall have and exercise the sole and exclusive right of routing all shipments under said joint rates beyond its terminus as well as upon the other conditions, provisions and stipulations hereinafter set forth."

The orange shipper had, therefore, the alternative of delivering its oranges to the appellants, to be carried under local rates to their terminals and there delivered to the connecting carrier, or of making a contract with the appellants for the carriage of the oranges to their point of destination in the east, under terms and conditions which the appellants stated were the only terms and conditions in pursuance of which they would undertake this duty. It is important to recollect that the duty or obligation of carriage to eastern points was not assumed by the initial lines under their obligation as carriers, but was a contract made independently of such obligation, so far as the carriage of the oranges beyond their terminals was concerned. As to carriage of freight beyond their own terminals, the appellants were in no way affected by the fact that they were common carriers, and they were free to carry on what terms they chose, or not to carry at all. It was open to the shipper to either make the contract which the appellants offered, or to resort to the obligation of the carrier under the common law as to transportation over its own lines. The shippers certainly could not compel the appellants to make with

them such a contract as they thought desirable in reference to the carriage of the oranges beyond the terminals of the initial lines. As to such transportation carriers were as free to contract as if they were not carriers, and it was for the shippers either to take the contract offered or else to send their freight over the lines of the appellants at local rates to be delivered at their terminals to their connecting carrier.

A carrier at common law has the right to select the agency which it shall employ to carry freight beyond its own terminal. The Interstate Commerce Act does not forbid this, but in the 6th section provides that when passengers or freight pass over continuous lines or routes operated by more than one carrier, and the several carriers establish joint tariffs of rates, copies of such joint tariffs must be filed with the Commission. The question then comes to this: Does this provision, in general terms as to the filing of a joint tariff, deprive the carrier of its common law right of routing?

It is to be noted that ever since the Interstate Commerce Act two or more connecting carriers might have an arrangement by which the initial carrier forwarded its freight on through bills of

lading over certain of its connections to the exclusion of others without the establishment of any joint rate. The goods might be forwarded under local rates over each road. Such an arrangement could in no way be claimed to be a violation of the Interstate Commerce Act and would be entirely within the common law. Does, then, such an arrangement become a violation of the Act simply because there is a joint tariff agreed on between the connecting carriers instead of the local rate being paid on each road?

It is certainly difficult to see what effect such a difference, viz.: that in one case there is a joint tariff and in the other there is not, can have on the question of the initial carrier having the right to route beyond its own terminal. If it can be done when there is no joint rate, then why can it not be done when there is a joint rate. What is there in the joint rate which should deprive the initial carrier of its undoubted common law right of routing?

It is still less plain when it is borne in mind that the joint tariff is a matter entirely of private arrangement between the carriers not governed in any way by the Act. As was said by Mr.

Justice BREWER in *Chicago & N. W. Ry. Co.* v. *Osborne*, 52 Fed. Rep., 912, 915:

> "The whole matter is left to the voluntary action of the companies, and in forming by agreement any joint tariff, the basis of division and the proportion of moneys each shall take is also a matter left to their determination."

In *Little Rock & M. R. Co.* v. *St. Louis, etc., Ry. Co.*, 63 Fed. Rep., 775, 778, it was said:

> "That neither by the common law nor by the Interstate Commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation."

In *Ky. & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 Fed., 567, 590, the Court said:

> "It is shown by the evidence that arrangements for joint through routes and through rates which create and establish a quasi partnership and agency relation be-

> tween the parties thereto are always, and necessarily, the subject-matter of private contract or agreement between the railway companies over whose roads the traffic is conducted, based upon various considerations."

As the joint tariff and what it shall contain is entirely a matter between the connecting carriers themselves, it is open to them to make any condition in it they see fit affecting their relation with each other, and in the present case the joint rates were agreed on between them upon the express condition that the initial carrier should have the right of routing beyond its own terminal. This clause of the joint tariff is found at p. 987 of the record as follows:

> "The joint tariffs and rates herein named are made and entered into upon the express condition that the initial carrier shall have and exercise the sole and exclusive right of routing all shipments under said joint rates beyond his terminus as well as upon the other conditions, provisions and stipulations hereinafter set forth."

The question now comes up whether the joint tariff as filed violates the Act because of the routing clause in it when such right of routing is vested in the carrier at common law.

The ordinary rule of construction requires that before a right which exists prior to a statute can be taken away it must be clear from the terms of the statute that such was the intention of the legislature, and before the carrier can be deprived of its right to route freight beyond its own terminal, which it has at common law, it must so appear by the clear and specific terms of the Act.

As to this, it was said by the Circuit Court of Appeals for the Eighth Circuit in *Little Rock & M. Ry. Co.* vs. *St. Louis, etc., R. Co.*, 63 Fed. Rep., 775, 777:

> "So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise."

And again at pages 779, 780, the Court restated the principle as follows:

> "Another necessary result of the doctrine contended for is that it deprived railway carriers in a great measure of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. *There ought to be a clear authority found in the statute for depriving a carrier of this important right, before the authority is exercised*, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated."

There is certainly nothing specific in the Act which prohibits an initial carrier from routing freight beyond its own terminal. Neither is there any general expression or clause which can be given that meaning. It is not at all clear how any such thought or intention could have been in the mind of Congress for it was legislating as to rates and not as to routes. It was passing a law requiring rates to be public and stable and not subject to change except after

notice for a given period and providing that there should be no discrimination in rates. There is nothing in the statute from beginning to end which contains the remotest suggestion as to routes and routing or shows that Congress ever considered such question.

Now, while the routing clause in the joint tariffs was an agreement between the connecting carriers, it was also a part, and an important part, of the consideration to be received by the carrier from the shipper for the service to be performed by the former. It was the condition of the agreement of transportation between the shipper and the initial carrier that the latter should have the right of routing. The offer of the carrier was that it would transport the oranges to eastern points if the shipper would pay $1.25 a hundred and give the initial carrier the right of routing. That the initial carrier should have the right of routing was one of the reasons of the rate charged for the transportation. It was the condition upon which the offer under the joint tariff was made. It was open to the shipper to accept the joint tariff as offered or to reject it. It was not open to him to make or to ask the Commission to make a joint tariff

to suit himself or such as he thought the railroad ought to make. The kind of a joint tariff which a railroad must make is not controlled by the Act. That is subject to agreement between the parties to it and there is nothing in the Act which gives the Commission the power to change the tariff as filed, and say what sort of a joint tariff should be made.

In *Central Stock Yards Co. vs. Louisville & N. R. Co.*, 118 Fed. Rep., 113 (affirmed in 192 U. S., 568), Mr. Justice DAY in his opinion said at p. 118:

> "But have the courts the right, in the absence of statute, to dictate to carriers the contracts they shall make in the interchange of traffic, and to require such to be carried out as the courts deem reasonable? The billing and transfer of freight from outside points over the two railroads is a matter of arrangement between them. The proportion of the joint tariff each shall receive, the handling of cars, the liability of one to the other, and other matters, are to be determined by the contract between the parties. Each controls its own railroad, and *may determine for itself upon what terms it will unite in a joint tariff.* No arrange-

ment exists with the Southern Railroad for the transportation and delivery of cars of live stock to the Central Stock Yards, if that can be assumed to be a station on the line of the Southern Railroad; *nor do we think a court of equity has the power to make one and supervise its execution; nor has this right been conferred upon the courts by the Interstate Commerce Act.* This doctrine is so thoroughly established as to require no more than the citation of the authorities in support of it."

In the case of *Prescott & A. C. R. Co.* vs. *Atchison, T. & S. F. Co.*, 73 Fed. Rep., 438, 439, Mr. Justice LACOMBE said:

"Now I know of no principle of common law which forbids an individual railroad corporation, or two or three or more corporations, from selecting as to which one of two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk. *And I do not find in the interstate commerce law sufficient to warrant*

the conclusion that the law has been changed in that particular."

In the case of *Cinn., N. O. & Tex. Pac. Ry. Co.* vs. *Interstate Commerce Commission*, 162 U. S., 184, 197, this Court adopted with approval the following language of Mr. Justice JACKSON in the case of *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 43 Fed. Rep., 37:

> "'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, *the act to regulate commerce leaves common carriers as they were at the common law*, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

If we are right in our understanding that the connecting carriers were not obliged under the

Interstate Commerce Act to make joint tariffs, and that any joint tariff was a matter of private arrangement between the carriers making it, and that only until made and as filed, it was subject to the provisions of the Interstate Commerce Act, then it is certainly difficult to see how any provision of such joint tariff, as between the parties making up the joint route, that the initial carrier shall have the right to route beyond its own terminal, can be deemed to be a violation of the sixth section of the Interstate Commerce Act.

The only attempt of the Interstate Commerce Act to control in any way joint tariffs is the provision in the 6th section of the Act requiring such tariffs, when agreed on between the railroads, to be filed with the Commission and to be given such publicity as the Commission may prescribe and the further requirement that such joint tariffs shall not be advanced or reduced except upon certain conditions. The terms of the joint tariff and the conditions upon which it is entered into by the parties are left open to the railroads and no control of such terms and conditions is vested in any way in the Commission. As was said by this Court in *Interstate Com-*

merce Commission vs. Railway Company, 167 U. S., 479, 504:

> "Further when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive) the requirement is only that such joint tariff shall be filed with the Commission, *and nothing but the kind and extent of publication thereof is left to the discretion of the Commission.*"

It is, however, claimed by the Commission that the exercise of routing by the appellants beyond their own terminals was a violation of the Interstate Commerce Law in that it subjected the shippers to "undue, unjust and unreasonable prejudice and disadvantage" (Record, p. 77). Just how this resulted is not made plain in the opinion of the Commission, and certainly does not appear from the testimony. All shippers had the same rights, and there was no discrimination between them. Every shipper had the right to compel the carrier to fulfill its obligations as a carrier, and carry the oranges offered to its terminals and there deliver the same to its connecting carriers, or to accept the offer made by the initial carrier to transport the oranges at a low price without

breaking bulk through to eastern points beyond its own terminals, if it controlled the routing. There was no discrimination or prejudice or disadvantage as between one shipper and another of any kind, either unjust or unreasonable or otherwise. Every shipper was treated alike, and we know of no answer to the statement of Mr. Knapp, the Chairman of the Interstate Commerce Commission, in his dissenting opinion, when he says (Record, p. 79):

> "Of course the carrier must exercise the right of routing in such way as to avoid discrimination between different shippers. That goes without saying, and it is a significant fact in this connection that it was not alleged in the complaints, proved at the hearing or claimed in argument that any actual discrimination between shippers had resulted from the control of the routing by the defendant carriers."

The same charge is made to each shipper. The same service is performed for each shipper, and so far as appears from the testimony the claim that the right of routing has been denied to the shipper is more a matter of words than of fact. The shipper under the present system is

given the right to select the line which shall deliver the oranges at the point of destination. He is given the right of diversion which is more promptly and satisfactorily performed now than it was prior to January, 1900. He has further the right to designate the towns through which his oranges shall pass on their way to final destination, in order that he may sell them at such points while in transit. The shipper is also given by the carrier on the day of shipment the routing which the oranges will take. It is difficult to see what more the shipper could have if he exercised the right of routing.

The whole matter, therefore, comes down to this one point: that the discrimination and undue prejudice complained of is the depriving the shippers who formerly received them of the rebates paid to them by the car lines. Having received these rebates for years, the shippers had come to regard them as properly belonging to them, and to be taken into consideration in estimating the profits of the orange business. It can hardly be claimed that this discrimination is one contemplated by the Interstate Commerce Act, and the result of the routing rule so far as it deprived the shippers of rebates cannot be

deemed in any way a violation of the Interstate Commerce Act.

The fact that the right of routing was not exercised by the appellants in any large degree as to other kinds of freight and citrus fruit does not result in any way in prejudice to such shippers as against the shippers of other products. Such right of routing was reserved and had always been reserved to the appellants in their general tariffs, but was only exercised when necessary. No rebates were paid in any other class of freight than citrus fruit and the occasion therefore seldom arose for exercising the right of routing. When it did, the railroads routed the freight. The testimony is undisputed that oranges were preferred freight. They were given the right of way over every other kind of traffic except passenger traffic. Every effort was made to expedite their transportation, and while it might be open to other freight to say that they were prejudiced by the preference given to the orange shippers, yet it is not clear how the latter could complain when their business was placed ahead of all other traffic.

In addition, the testimony shows that the oranges were sent forward to eastern points over

substantially the same routes after January, 1900, that were used prior to the adoption of the routing rule by the railroads (Record, p. 879). Further than that, the evidence is that, when a shipper requested a special routing, it was almost invariably granted. The one exception was when the railroad believed and had reason to believe that the request was not made in good faith but simply to test the right of the carrier to make the routing.

It therefore seems impossible to claim that the shippers have been subjected to any "undue, unjust and unreasonable prejudice and disadvantage" within the terms and meaning of the Interstate Commerce Act.

What is meant by the Commission in its opinion (Record, p. 77), when it says that the routing rule "gives to the carriers an undue and unreasonable preference and advantage" is not plain. In the first place, it is not clear what preference and advantage the carriers gain by this routing except that they are able to prevent rebates which are prohibited by the Act. So far as their own lines are concerned, the appellants get no more business whether they route the oranges or whether the shippers do. In either

event the orange cars must leave California over their lines. In the second place, the provisions as to discrimination contained in the Act relate to discrimination between shippers and to the giving an undue and unreasonable preference and advantage to one shipper over another, and do not and were never intended to relate to a preference as between a carrier and a shipper. No such situation is contemplated by the Act, and even if it was possible to spell out of the circumstances of this case such a preference and advantage to the carrier, it would not come within any prohibition of the Act of Congress.

The Interstate Commerce Commission in its opinion seems to proceed upon the theory that the right of routing might possibly be exercised by a carrier in such a way as to result in discrimination in favor of one shipper to the prejudice of another. In other words, they claim that while the railroads have not in the exercise of this right actually discriminated, yet it might be possible for them to so discriminate, if they desired to do so; but this does not seem to have been the question before the Commission. Its duty was to decide whether there had been any undue preference of one shipper over another by

the exercise of the routing rule, and not whether it would be possible to exercise the privilege of routing in such a way as to result in discrimination.

At p. 76 of the Record, it is stated in the opinion of the Commission that:

> "It is not a sufficient excuse for the practice under discussion to say that the first carrier's control of the routing beyond its rails must be so exercised as not to unduly discriminate. The granting of a given routing to one and the denial of the same to another is itself an unjust discrimination."

There is no evidence in the record that one shipper asked for a routing which was granted, and that another shipper asked for the same routing and it was denied to him. On the contrary, the testimony is that whenever any shipper asked for a routing it was invariably given to him, except in the special case which was not brought in good faith, and which was refused by the railroads upon that ground.

DECISION OF THE COURT BELOW.

The reasoning of the Commission was disregarded by the Court below, but its order was

sustained by Judge WELLBORN upon the theory that the routing provision contained in the special citrus fruit tariff was in itself a contract for the pooling of freight. At page 1034 of the Record he says:

> "The question here presented is * * * whether or not the routing provision, which the evidence adduced on final hearing shows, and the answers of the defendants admit to have been part of the agreement between the defendants themselves and their eastern connections, and pursuant to which their subsequent joint tariffs were filed with the commission, is itself a contract or combination for the pooling of freights."

Again, at page 1039, Judge WELLBORN says:

> "There is no escape from the conclusion, it seems to me, that said routing contract is a pool, and the remaining question is whether or not it is such a pool as the commerce act makes unlawful."

Afterwards, in speaking of the case of *United States v. Freight Association*, 166 U. S., 290, he says:

> "No such situation it should be borne in mind was before the court then as is here

presented, namely, a traffic pool or more specifically, a contract for the distribution of freight between different and competing railroads by arbitrary routings of the initial lines regardless of the wishes of shippers."

At page 1045, he goes on to say:

"After careful consideration of the subject, I am of opinion that any contract, agreement or combination between different and competing railroads, whereby the volume or quantity of freights each or any shall receive for transportation is to be determined by or through any conventional means or agency, which was intended to, and does suppress competition either in rate or service or competition directly addressed to shippers, is a traffic pool, within the meaning of section 5 of the Interstate Commerce Act, and that the routing contract here in controversy does so apportion freights among the defendants' eastern connections, and is essentially such a pool."

It is plain that the court below puts its decision squarely upon the ground that the right of routing was a traffic pool, but just how it was a traffic pool or how the joint tariff with the routing provision in it was any more a violation of the 5th

section of the Interstate Commerce Act than a joint tariff without such clause is not very clear.

The Court below was very particular to point out, that the question before it was

> "Not whether there was a tonnage pool between the connecting carriers, to which the defendants, although they promoted its ends through the use of the routing rule, were not parties, as was found by the commission, nor whether there was a traffic pool between the defendants, to which the connecting carriers were not parties, which was one of the issues the commission for lack of satisfactory evidence, retained for further investigation." (Record, p. 1034.)

We must confess that it is very difficult for us to follow the reasoning of the lower Court. It is said by it that the routing provision of the joint tariff is itself a contract or combination for the pooling of freight, and in the same breath it says that in the proceeding before it there was no question as to whether there was a tonnage pool between the connecting carriers or a traffic pool between the initial carriers. If, as a fact, there was no tonnage pool either between the initial carriers or the connecting carriers, it is a

little difficult to see how the offer made by the appellants to the public to carry oranges beyond their terminal points, if they do the routing, can be twisted into a combination for the pooling of freight. Why should an arrangement, perfectly innocent on the face of it, and one permitted at common law, be deemed a combination for the pooling of freight, when it is conceded that no pooling of freight resulted therefrom ?

In the first place, what is this combination? What railroads are parties to it? Who is it between? A combination between the initial lines on the one side and the connecting lines on the other (if there were any such combination, which we deny) would certainly not violate the act, as that requires the contract to be between competing lines and the Lake Shore or the Pennsylvania roads can hardly be called competitors with the Southern Pacific. The portion of the 5th Section of the Commerce Act with which we are now concerned reads as follows :

> "SECTION 5. That it shall be unlawful for any common carrier subject to the provisions of this act, to enter into any contract, agreement or combination with any other common carrier or carriers for the

pooling of freights of different and *competing* railroads."

As we have seen, the offer of the initial lines to the public to take freight for eastern points, if they may have the routing of it, can hardly be called a contract between competing roads, even if it was possible to construe such an offer as an agreement between the appellants and the eastern lines. We are therefore left in our search for the parties to this combination to the eastern lines themselves. Now as to these lines the record is absolutely devoid of any evidence or any suggestion of evidence that there was any combination or agreement between any of them in regard to the exercise of routing by the initial carriers. It is not a matter about which any argument can be made. The fact is there, that in this long litigation it has never occurred to any one to suggest, much less to offer any evidence upon the point, that the eastern lines had entered into an agreement or combination between themselves as to the routing by the initial carriers.

These eastern lines are not parties to this proceeding. They have never had their day in

court. The point was raised by demurrer that they were necessary parties and the demurrer was overruled. It is certainly an extraordinary situation if railroads not parties to a proceeding can be held to have violated the Commerce Act, when the defendants in such proceeding are held not to have done so. That is to say if the routing rule was a combination between the eastern lines such as is prohibited by the Act, then such eastern lines ought to have been parties to this proceeding and the case should have been dismissed upon the ground that they were indispensable parties in whose absence the court would not proceed.

Of course, the initial carriers would not have any interest in any such arrangement. No motive has been suggested for their being interested in any such agreement or combination. Their carriage was the same in any event. When shipped over their lines they would naturally carry the oranges to their own terminals, and the routing rule had no practical application, except to the carriage of the oranges beyond the terminals of the initial carriers.

In the final decree (Record, p. 112), after referring to the special joint tariff relating to citrus

fruits which has been filed by the initial carriers and their immediate connections, it is stated:

> "That said agreement and tariff are now in force and observed by all of the parties thereto, and that the said routing provision so agreed upon and embodied in said tariff is an agreement and combination for the pooling of freights of different and *competing* railroads and violative of section 5 of the commerce act mentioned in said bill of complaint."

As we understand this decree, it was intended to mean that the joint tariff was filed as part of an agreement between the initial lines and the eastern roads, and that it was understood at the time of filing what traffic would be given to each of the eastern lines, parties thereto.

The evidence, however, does not in any way sustain this view of Judge WELLBORN, for the following reasons:

1. The tariff which was filed by the initial lines containing the provision as to the exercise of the routing privilege by the initial carrier, was not when filed, agreed to by the eastern lines. It was signed only by the Southern Pacific Company, the Atchison System, and their

immediate connections, viz., the Union Pacific and the Texas Pacific, and it was especially provided that the through rate would apply over the connecting roads only in the cases in which their traffic officials should "certify their concurrence therein to the Interstate Commerce Commission" (Record, p. 457). In other words, the parties signing this joint tariff were all on one side of this alleged "contract, agreement or combination." They had no interest whatever in this traffic pool. The oranges consigned to eastern points would go over their lines, whether there was a traffic pool or no traffic pool. The tariff, therefore, containing this objectionable provision as to routing which Judge WELLBORN calls a traffic pool, was not agreed to by the eastern lines. It was necessary that they should so agree in order to work out a violation of the fifth section of the act. There must be an agreement by one common carrier with another competing common carrier for the pooling of freight in order to conflict with the requirements of the Commerce Act. The common carriers who signed this tariff were all on one side and are in effect one party. The other necessary party in order to make this joint tariff a contract or combina-

tion were the eastern lines, but they did not sign this tariff and it only applied to them in case their traffic officials certified their concurrence therein to the Interstate Commerce Commission. Therefore, this special citrus fruit tariff could hardly be called a combination between the initial lines and the eastern lines for the pooling of freights over the eastern lines, when the eastern lines were not parties thereto.

Even if there had been such an agreement (we unqualifiedly deny that there was) we do not see how it could be deemed a violation of the Act, as the eastern lines and the initial carriers can hardly be called competing. To violate the Act the agreement must be between competing carriers.

2. The testimony is all one way upon the point that no agreement of any kind whatever was had with the eastern lines. As to this Mr. Paul Morton, who was at the time of his examination the Second Vice-President of the Atchison System, says (Record, p. 126):

> "Q. But so far as any agreement with your eastern connections is concerned, or any understanding that any eastern con-

nection shall have one per cent. or fifty per cent., what is the fact?

A. There is absolutely no agreement whatever of any kind with any of our eastern connections. * * *

Q. As you state that there is no understanding that you know of between the initial carriers or the Santa Fe Companies and Southern Pacific and their eastern connections, I will ask you whether there is any agreement or understanding, if you know, between the eastern connections themselves as to a division of this business?

A. I think not. Otherwise we would have been advised of it and have been asked to help them carry it out as far as possible, and we have had no such request."

Mr. William A. Bissell, the Assistant Traffic Manager of the Atchison System, testifies at p. 879 as follows:

"Q. Now, Mr. Bissell, it is suggested in the opinion of the commission that this routing that you have assumed control of was for the double purpose of making a pool with the eastern connections? * * * I will ask whether there is any traffic pool between the initial carriers and their eastern connections?

A. There is absolutely none. That is indicated I think in these telegrams. These men were satisfied that it was a good thing to do if they got a fair share of the business.

Q. Has there ever been an understanding with those connecting lines as to whether they would get one per cent. or ninety-nine per cent. or any other per cent.?

A. There has never been any understanding with those roads as to what they would receive, beyond the statement that they would be given fair treatment; and, as *a matter of fact there is not one of them that to-day knows what percentage of the business they get.*

Q. Then you mean to say there is no tonnage pool?

A. There is no tonnage pool. * * *

Q. Well, that is what I mean, that there was not a tonnage pool with your eastern connections based upon this routing?

A. Absolutely no. It never was thought of."

In the testimony of Mr. William Sproule, the Freight Traffic Manager of the Southern Pacific Company, he says at page 919, as follows:

"Q. Now Mr. Sproule was there any relation of any kind between the system of

routing under the exercise of the right of the initial carrier to route as made effective by the tariff of January, 1900. Was there any relation between that condition of things and the existence of any tonnage pool among any connections whatever of yours?

A. None whatever, sir. That tonnage pool is a myth from the beginning.

Q. Did it ever have any existence?

A. It had no existence. What do you refer to now? To our connections?

Q. To your connections?

A. It had no existence whatever. Let me explain. As I have heard this stated in various ways here, the suggestion has been made that we were a party in some way to a tonnage pool between our immediate connections. Now, our immediate connections —am I correct?

Q. Or any connections ?

A. Well, any connections. Well, we haven't got any pool with any connection."

W. G. Barnwell was examined in regard to the distribution of the freight among the Eastern lines and testified that these distributions were made without the Eastern lines knowing what percentage they were to get. He says at page 443, as follows:

"Q. Who makes these distributions? Who figures them out?

A. Well, it is done principally by Mr. Chambers, with my assistance.

Q. The General Freight Agent?

A. Yes, sir.

Q. Does he or do you and he do it alone? *By that I mean do you make these distributions without consulting the connecting carriers to whom the distributions are to be made?*

A. *Yes, sir, we do.*

Q. *Do your connections know what these distributions are?*

A. *No, sir; up to this time they do not.*

Q. *Do you vary these distributions from time to time?*

A. *Yes, sir. We are not obliged to follow that distribution at all. That is merely as a guide.*

Q. Is the distribution as a matter of fact followed exactly?

A. No, sir. It is not."

Again, at page 445, he says:

"Q. Now, although this has been covered by different interrogatories, I want to ask you directly whether there exists, or has ever existed since 1900, when the right

to route citrus fruit was reserved by the initial carriers involved in this case, any understanding of any sort with connecting carriers in any part of the United States or Canada, or with car companies, their representatives or agents, about the amount of business that should be distributed to any railroad line or car line?

A. No, sir, most emphatically no.

Q. Or as to the division of freight receipts from citrus traffic?

A. Only as governed by what is known as our division sheet.

Q. The same as applies to other traffic?

A. The same as applies to other traffic."

The foregoing testimony is all that is to be found in the Record upon this point, and in the face of such evidence, given without any qualification by men of high standing, it is difficult to see how a combination between the eastern lines and the initial carriers for the pooling of freight can be said to have resulted from the filing of the special citrus fruit joint tariff.

The essential element of a violation of the pooling clause of the Interstate Cammerce Act is an agreement or combination between the carriers for the physical division of the freight.

The tariff itself cannot be deemed such an agreement or combination, because it was not signed and agreed to by the eastern lines. That there was no other arrangement between the initial carriers and the connecting lines prior or subsequent to the special citrus tariff is shown by the undisputed evidence above set forth. It is therefore not plain how this clause relating to the right to route contained in such tariff can be deemed to be an agreement or combination between the appellants and the eastern lines for the purpose of creating a traffic pool, especially as any such alleged pool could be of no interest whatever to the initial lines, the business of which would be unaffected by the existence or non-existence of such a pool.

AS THE GROUNDS OF THE DECISION OF THE COMMISSION AND OF THE COURT BELOW ARE BOTH UNTENABLE, IT WOULD SEEM THAT THE INTERSTATE COMMERCE ACT DOES NOT DEPRIVE THE CARRIER OF ITS COMMON LAW RIGHT TO ROUTE THROUGH FREIGHT BEYOND ITS OWN LINE.

If we are correct in our contention that the exercise by the carrier of the right of routing through freight beyond its own terminals does

not create any undue or unreasonable prejudice against any shipper in favor of any other shipper as the Commission holds, and that such right of routing is not a traffic pool as the lower court decided, then we come to the question of whether the exercise of this right violated the Interstate Commerce Act in any other respect.

There are in this case three important points which are practically conceded.

1. Prior to January 1, 1900, the eastern lines all paid rebates to the private car lines in return for the routing of oranges by the car lines.

2. The routing rule was adopted by the initial carriers solely for the purpose of breaking up this rebate system.

3. The rebate system was broken up and no rebates have been paid since January 1, 1900.

It is agreed by the Court below and by the Commission that the practice of paying rebates is a great evil, "was violative of the commerce act and cannot be too strongly reprobated" (Record, p. 1025). It is also admitted to be a good thing to have it broken up, but they say that the means employed were not proper, and that a good end is not to be reached by improper and unlawful means.

The position of the appellants is that the means employed to break up the rebate system were not only not a violation of the Interstate Commerce Act, but were perfectly legitimate and proper from every point of view, and open to the closest scrutiny and investigation. To fully appreciate and understand the situation it will be necessary to refer in considerable detail to the testimony contained in the record, and we will endeavor to show by extracts from this testimony the situation prior to the enactment of the routing rule, the reasons why the routing rule was adopted and the situation after the routing rule.

SITUATION PRIOR TO JANUARY 1, 1900.

Prior to January 1, 1900, the rebate system had increased to such an extent that practically no shipment of oranges went forward without private car lines receiving rebates thereon. It became a matter of public notoriety because of the fact that private car lines made their demands openly, believing that they were not subject to the provisions of the Interstate Commerce Act, and could receive such rebates without risk. How common the practice had become is best shown by the testimony of the shippers themselves.

A. F. Naftzger, who was the President and Manager of the Southern California Fruit Exchange, one of the complainants in the original proceeding before the Interstate Commerce Commission, says at page 804 of the record, as follows:

> "MR. HUNSAKER: What car line made those allowances or discounts prior to 1899?
>
> MR. NAFTZGER: All the car lines to the best of my recollection that we ever used in our businsss."

Again at page 811, Mr. Naftzger testifies as follows in answer to members of the Commission:

> "COMMISSIONER CLEMENTS: When did this rebating practice begin?
>
> MR. NAFTZGER: I don't know, sir. It seems to have been here when I came.
>
> COMMISSIONER CLEMENTS: How far back? When was that?
>
> MR. NAFTZGER: Well, I think my first experience must have been along about 1892 or 1893.
>
> COMMISSIONER CLEMENTS: It was in vogue here then and has been ever since.
>
> MR. NAFTZGER: Yes, until now.
>
> COMMISSIONER CLEMENTS: Until this year? After this conference you testified about; is that when it ceased?

MR. NAFTZGER: No, sir; there has not been anything this year; not within sight of me at least.

COMMISSIONER CLEMENTS: Did it stop before that conference was held or afterwards?

MR. NAFTZGER: There had been no refrigeration before that.

COMMISSIONER CLEMENTS: Before this season?

MR. NAFTZGER: No, sir.

COMMISSIONER CLEMENTS: So it has not applied to this year as far as you know?

MR. NAFTZGER: No, sir; not so far as I know.

COMMISSIONER CLEMENTS: When it was in vogue what determined whether the rebates should be 10 per cent., 15 per cent., 20 per cent. or 25 per cent.? Was there any rule about it?

MR. NAFTZGER: *I suppose it was the bearing-down qualities of the man who was getting it.* I don't know.

COMMISSIONER CLEMENTS: Was there any uniformity about it?

MR. NAFTZGER: I don't think there was. It was not an open reduction.

COMMISSIONER CLEMENTS: Did some people get it and some not?

MR. NAFTZGER: *I think pretty nearly everybody got it that went after it.*

COMMISSIONER YEOMANS: *Did you always go after it.*

MR. NAFTZGER: *I did.*

COMMISSIONER CLEMENTS: Well, that was not governed by the amount of the charge that was fixed by the territorial groups?

MR. NAFTZGER: Yes, sir, it was; there was a larger allowance on the long hauls than on the short hauls.

COMMISSIONER CLEMENTS: Was it a percentage in all cases?

MR. NAFTZGER: No, sir; it was generally an even proposition of $5, $10 or $15, as the case might be.

COMMISSIONER CLEMENTS: On a car?

MR. NAFTZGER: Yes, sir; on a car.

COMMISSIONER CLEMENTS: How was it arranged for—by an understanding when the shipment was made that it was to be paid?

MR. NAFTZGER: An understanding with the car line at the beginning of the season that the use of those particular cars would secure that allowance on the refrigeration.

COMMISSIONER CLEMENTS: The understanding was had between the shipper and the car line?

MR. NAFTZGER: Yes, sir.

COMMISSIONER CLEMENTS: Was it taken off before the freight was paid?

MR. NAFTZGER: No, sir; it was in the shape of a refund after the tariff had been paid.

COMMISSIONER CLEMENTS: Why was it done that way?

MR. NAFTZGER: Well, that is the only way in which it could be done and not make an open reduction. If it were in the shape of a reduction of the tariff charge in the beginning, of course that would, in effect, be making an open rate.

COMMISSIONER CLEMENTS: Well, the effect was the same?

MR. NAFTZGER: *It was; but it was not known to all shippers. Some of them got caught on the full rate, I presume.*

COMMISSIONER CLEMENTS: What was the objection to all shippers knowing it?

MR. NAFTZGER: I suppose the car lines did not want to give it up when they did not have to?

COMMISSIONER CLEMENTS: Was secrecy always enjoined about it by the car lines?

MR. NAFTZGER: Yes, sir; it was generally a confidential proposition.

COMMISSIONER CLEMENTS: Who was it paid back by?

MR. NAFTZGER: The car lines.

COMMISSIONER CLEMENTS: Over all the roads?

MR. NAFTZGER: The railroads did not have anything to do with it, so far as the shipper was concerned.

COMMISSIONER CLEMENTS: No matter what road it went over?

MR. NAFTZGER: No, sir, I said there was a time when the rebate on the refrigeration was affected somewhat by the routing, but that has not been the case for several years.

COMMISSIONER CLEMENTS: *Was it paid by the railroad or car line?*

MR. NAFTZGER: *By the car line;* but there was a time, as I have stated before, when the car lines, or some of them, would pay something more back if the shipment traveled over certain lines.

COMMISSIONER CLEMENTS: Do you mean certain initial lines or certain intermediate lines?

MR. NAFTZGER: That usually had relation to the connecting lines; not the initial lines.

COMMISSIONER FIFER: Did the car com-

pany dictate the terms to the eastern connections?

MR. NAFTZGER: I assume they did, or to a certain extent. I do not personally know that."

Of course, clear and definite testimony of the number of times rebates were paid and the amount of them is not possible of ascertainment for the reason that accounts of such matters were not kept, as Mr. Naftzger very frankly stated in answer to a question from a member of the Interstate Commerce Commission as to why he did not have books showing the amounts received by him as rebates, when he said (Record, p. 816):

"Well, it was one of those accounts that was not of interest as a relic."

Mr. C. E. Maud, the President of the Consolidated Forwarding Company, the other complainant before the Interstate Commerce Commission in the original proceeding, admits quite as frankly the custom of rebates. At page 818 of the record, we find this testimony:

"MR. HUNSAKER: State what the practice has been of those car lines with reference to refunding a part of the charges made for refrigeration.

MR. MAUD: Well, as long as I have been in the business there has been a refund.

MR. HUNSAKER: To what extent?

MR. MAUD: Well, from a very small percentage up to 25 per cent. of the refrigerator charges.

MR. HUNSAKER: How much per car?

MR. MAUD: Well, it might be at the flat rate of say $15 per car.

MR. HUNSAKER: To what points?

MR. MAUD: I say a flat rate that would cover all shipments.

MR. HUNSAKER: Do you mean an average?

MR. MAUD: Yes.

MR. HUNSAKER: Well, what is the maximum amount which you have been allowed in the way of a refund or rebate by refrigerator lines?

MR. MAUD: $35.

MR. HUNSAKER: And the minimum?

MR. MAUD: $5.

MR. HUNSAKER: To what points have you been allowed as high as $35?

MR. MAUD: Why, that was east to the Atlantic seaboard.

MR. HUNSAKER: Now all of these companies made you that allowance prior to the this season?

MR. MAUD: No.

MR. HUNSAKER: Well, which of them made the allowance?

MR. MAUD: They all made some allowance."

Samuel H. Westfall, another witness before the Interstate Commerce Commission, who is engaged in the fruit shipping business, testified very frankly that the rebates were paid by the private car lines for the privilege of routing the oranges, and said at page 829 of the record:

"MR. HUNSAKER: Did you receive any rebate or allowance on those rates from the car lines?

MR. WESTFALL: Two years ago there was an additional allowance, small allowance.

MR. HUNSAKER: What was it?

MR. WESTFALL: It was paid for the privilege of dictating the route."

Again at pp. 830 and 831, Mr. Westfall testifies as follows:

"MR. HUNSAKER: Did you receive those allowances when there was no refrigeration?

MR. WESTFALL: We did.

MR. HUNSAKER: When you shipped under refrigeration did you receive these

same allowances and also an additional allowance on the refrigeration charge?

MR. WESTFALL: Most of the time we received this same amount regardless of refrigeration, but a part of the time we received additional.

MR. HUNSAKER: Why, Mr. Westfall, did you seek and receive these rebates from these private car lines?

MR. WESTFALL: For the purpose of being as nearly as possible upon an equal basis with our competitors. It was necessary in order to compete to accept these additional earnings.

MR. HUNSAKER: Can you state how much you received from this arrangement with Mr. Hosbury, in the shape of rebates?

MR. WESTFALL: It would simply be a sort of an estimate; I should say we received several thousand dollars, perhaps. * * *

MR. LAMBERTSON: What salary did you pay Hosbury?

MR. WESTFALL: I paid him no salary.

MR. LAMBERTSON: How did he get his pay?

MR. WESTFALL: I presume that he considered that the privilege of making the route over which our cars should pass would be sufficient for his trouble.

MR. LAMBERTSON: You did not pay him anything?

MR. WESTFALL: Nothing.

MR. LAMBERTSON: Yet he was your general traffic manager without a salary, and you employed him to work the different car lines and railway companies in your interest and get as many rebates as possible?

MR. WESTFALL: I did not.

MR. LAMBERTSON: You did not?

MR. WESTFALL: I did not.

MR. LAMBERTSON: Did he come to you or you go to him?

MR. WESTFALL: He came to me."

Another fruit shipper, Mr. F. B. Fay, testifies as follows at p. 833 of the record:

"MR. HUNSAKER: Now have these private car lines which you have mentioned been accustomed to make allowances or rebates to you from their regular tariff rates for refrigeration?

MR. FAY: Yes, sir.

MR. HUNSAKER: To what amount, or in what amount?

MR. FAY: Why, it has varied different years and to different points.

MR. HUNSAKER: Well, last year, what

was the allowance made to you, or rebate on refrigeration charges?

MR. FAY: $25 per car.

MR. HUNSAKER: $25 per car all around?

MR. FAY: On refrigeration charges.

MR. LAMBERTSON: On refrigeration alone?

MR. FAY: Yes, sir.

MR. HUNSAKER: What allowance, if any, was made where the fruit was not moved under refrigeration?

MR. FAY: We had a rate to different points. It varied from $10 to $25, I believe."

That very little of the rebates received by the car lines were ever received by the small shippers, is very apparent from Mr. Fay's testimony at page 835, where he says as follows:

"MR. HERRIN: *Did you not in any case ship fruit belonging to other people?*

MR. FAY: *Yes, I think possibly there may have been some small shipments.*

MR. HERRIN: *What did you do with the rebates in this case? Turn it over to the shippers?*

MR. FAY: *No sir, I did not.*

MR. HERRIN: *Kept it yourself?*

MR. FAY: *Yes, sir.* * * *

MR. HERRIN: *Why did you not turn it over to the shipper in such a case?*

MR. FAY: *They were very small shipments and unimportant.*

MR. HERRIN: Such a little thing! it was unimportant. Then the rebate in that instance, where you shipped for others and took the rebate, you did not take the rebate in that case to put yourself on an equality with your competitors, did you? You took it to get something more than that?

MR. FAY: I don't know what my competitors were doing, whether they were retaining it in a like instance or not.

MR. HERRIN: Why did you not decline to receive a rebate in the case where you were shipping for somebody else? Why did you not content yourself with going on and not receiving rebates in these cases?

MR. FAY: Of course, these small shipments went along with the others.

MR. HERRIN: Then why did you exact the rebate in this case?

MR. FAY: No exaction.

MR. HERRIN: They forced them on you.

MR. FAY: They offered them to us.

MR. HERRIN: You took them, and did not turn them over to the shipper?

MR. FAY: No, sir.

Again Mr. Fay has some further interesting testimony on this point at pages 838, 839 of the record:

"COMMISSIONER CLEMENTS: You have got rebates in all cases, whether refrigerated or not?

MR. FAY: No, sir; not in all cases. A good many cars were thrown out.

COMMISSIONER CLEMENTS: Well, as a general rule you did, did you?

MR. FAY: There were a good many cars to non-competing points that were thrown out.

COMMISSIONER CLEMENTS: On those you got no rebates?

MR. FAY: No, sir.

COMMISSIONER CLEMENTS: Now, in cases where it went under refrigeration, who collected the refrigeration charge, the railroad company or the car line company?

MR. FAY: Over the Santa Fe road the railroad collected the refrigeration. Shipments over the Southern Pacific were collected by the car lines.

COMMISSIONER CLEMENTS: Well, in case it went without refrigeration, there was no charge of that sort?

MR. FAY: No, sir; I believe not.

COMMISSIONER CLEMENTS: What did you say?

MR. FAY: No, sir.

COMMISSIONER CLEMENTS: Was not?

MR. FAY: No.

* * * * * * * *

MR. FAY: Yes, sir.

COMMISSIONER CLEMENTS: And that was paid by the car line company?

MR. FAY: Yes, sir.

COMMISSIONER CLEMENTS: Do you know from what source they obtained money to pay rebates on a shipment when they received no compensation at all on that shipment? Where it went without refrigeration they collected nothing, and yet they paid $15 or $17?

MR. FAY: I do not know from what source they obtained it.

COMMISSIONER CLEMENTS: Did they ever tell you?

MR. FAY: No, sir.

COMMISSIONER CLEMENTS: You say your profits are less this year by the amount of the rebates than they were last year?

MR. FAY: I would presume so.

COMMISSIONER CLEMENTS: I don't want you to answer the question without due consideration, and without understanding;

but I want to ask you next whether you pay any more to the people from whom you buy when you get rebates than when you don't get rebates?

MR. FAY: *No, sir.*

Mr. Leland Lyon, another fruit grower and shipper originally examined in behalf of the petitioners, testified as follows (pp. 842, 843):

"MR. LAMBERTSON: Did you get any rebates from anybody but the car lines?

MR. LYON: My understanding was it came all through the car lines.

MR. LAMBERTSON: Who did you get it from?

MR. LYON: The people representing the car lines.

MR. LAMBERTSON: Well, did you get anything from a man by the name of Hosbury?

MR. LYON: I think we did some several years ago; not for several years. * * *

MR. LAMBERTSON: Did any agents of the railway companies come out here from the East and offer you anything?

MR. LYON: Not to any extent, I think. There have been some, yes, sir, in some small ways.

MR. LAMBERTSON: If you would route over particular roads?

MR. LYON: We have been asked to.

MR. LAMBERTSON: You have been asked to?

MR. LYON: Yes, sir.

MR. LAMBERTSON: Will you swear that you never got anything from eastern roads direct?

MR. LYON: I think we got, sometimes, a small amount from some eastern roads, but never to any extent. It was not our custom. *Our business was done almost wholly in that line through the car lines or their representatives.*

Mr. Earl, President of the Continental Fruit Express, and of the Earl Fruit Company, testified at page 847 of the record as follows:

COMMISSIONER CLEMENTS: Is it a fact that your company has been allowing some of these rebates to shippers where you did not do any refrigeration at all, provided they would allow you to control the routing?

MR. EARL: There was a demoralizing warfare between these car lines; there was patent litigation pending between them, and bitter feeling, and they resorted to all man-

ner of means to hurt each other, and we gave up to shippers, in order to keep our cars moving, $15 a car, say. We didn't figure what it came out of. It came out of our revenue.

COMMISSIONER CLEMENTS: You gave about $15 a car when you were getting about $25 mileage?

MR. EARL: Yes, sir.

COMMISSIONER CLEMENTS: And then you would pick up more mileage east of here?

MR. EARL: We would simply have to go to some of our friends to help us out.

COMMISSIONER CLEMENTS: What railroads have been paying you rebates in this way within the last year?

MR. EARL: I cannot designate any routes from my own knowledge except this Hosbury route, the Clover Leaf route. Two years ago he offered us inducements to route business that way.

COMMISSIONER CLEMENTS: In all this scramble for business after it leaves these initial roads, resulting in all these various ways of allowing concessions for the business, under one name or another, does it all fall on the Clover Leaf?

MR. EARL: No, sir; I do not think so. I think the Clover Leaf was more flagrant

in demoralizing the situation than any other line.

COMMISSIONER CLEMENTS: But can't you name any other line with whom you had such transactions?

MR. EARL: No, sir; I cannot.

COMMISSIONER CLEMENTS: Because you don't know?

MR. EARL: Not from my own knowledge. I happen to know something about the Clover Leaf man personally.

COMMISSIONER CLEMENTS: So you have not only the refrigerator charges, but the contract mileage and various other mileages, wherever you could get it, from which to get money to pay the rebates that you have been paying here to shippers?

MR. EARL: We took it out of our earnings. I would not say one source or another. There were several sources of earnings."

Mr. Arthur Gregory, a fruit grower and shipper of Redlands, California, after being asked in regard to the representatives of the eastern lines which called upon him for business, testified as follows (pp. 850–851):

"Q. Did they offer you any rebate?

A. The railroad company?

Q. Any of these agents?

A. The car lines?

Q. These solicitors for the eastern lines, soliciting your business and offering you these things?

A. Some did and some did not.

Q. Did you ever accept what was offered that way?

A. Sometimes I did.

Q. *Why did you refuse it?*

A. *Because it was not enough.*"

Again, at page 852, he further testifies:

"Q. *From whom did you get these rebates, from the car lines or the railroad?*

A. *Car lines.*

Q. About what amount?

A. $10 to $25.

Q. *Did you get those rebates from the car lines now operating here in this traffic?*

A. *Yes, sir.*

Q. *All of them?*

A. *Yes, sir.*

Q. *Get it from all of them?*

A. *Yes, sir.*"

It is very evident that the petitioner in this proceeding before the Interstate Commerce Commission was not willing to make a full disclosure of this rebate practice for its President, Mr. Naftzger, testifies as follows at page 859:

"Q. Mr. Naftzger, I will ask if you have now told us fully and made a complete disclosure of all remuneration or money that has come to you from Mr. McIntosh, directly or indirectly, by reason of any car line transaction whatsoever? Why do you hesitate?

A. *No, I have not.*

Q. What else was there?

A. *I don't intend to tell.*

Q. You refuse to answer?

A. You can put it that way if you like."

The foregoing extracts from the record show the situation and the demoralization in the orange traffic from California to eastern points prior to the routing by the Railroads. The evidence of the railroads is in entire accord with the testimony given by the various witnesses for the petitioners, and is perhaps as well expressed as it can be in the letter of President Ripley of the Atchison System to Mr. Maud, the President of the Consolidated Forwarding Company, one of the petitioners, dated January 15, 1900, set forth in full at page 820 of the record. He there says:

"Two years ago there were in use, in the handling of the citrus fruit business of Cali-

fornia some four or five private car lines, in addition to the cars owned by this Company. It is an open secret that these lines were in the habit of soliciting from our eastern connections a money consideration in return for their alleged influence upon the routing of business, and when such considerations were obtained it was the custom of those lines to divide the amount to a greater or less extent with the shippers of the fruit. In some cases the owners of the car lines were also shippers of fruit, in which case whatever concessions they might be able to obtain from our eastern connections resulted to their advantage. The situation was chaotic, and resulted, as I believe, in a detriment to all concerned. It was certainly burdensome to the railroad companies, the tendency being to crowd into California more cars than could be used, as well as to compel us to use certain classes of cars to which there were serious objections."

Mr. Paul Morton, at that time the Vice-President of the Atchison System, speaks about the giving of rebates as follows (p. 122):

"Q. Do you mean to say that under the order of things that you describe one shipper would get a lower rate than another?

A. I mean to say that under the condition of things that existed to January 1, 1900, there was a great discrimination, and in nearly every instance Mr. Earl received better rates than any of his neighbors did.

Q. And am I to understand from the statement that you have made as to how Mr. Earl and the other car lines disposed of the business, that they controlled the routing?

A. The routing was left in their hands largely by the people whose business they handled.

Q. That is to say, the shippers turned over their business to the car lines for a consideration?

A. Yes.

Q. The consideration being this rebate?

A. Being the portion of the rebate that Mr. Earl received. He made the best terms he could with them.

Q. With the shippers?

A. Yes. In some instances the shippers got possibly all there was in it. In other cases they got a small portion of what Mr. Earl received, but they were mad and they did not like it. They said it was placing their competitors on a basis that was not fair to them. All of them were indisposed

to accept that situation, and it was very unsatisfactory to our Company, and it was to them.

Q. Then do I understand that after making the best terms he could with the shippers for a consideration, he went to the connecting carriers and made the best terms.

A. Sold his business to the highest bidder.

Q. And sent it over such connecting carrier as would do the best?

A. As would do the best.

Q. And not over the connecting carrier that some shipper might want to have used?

A. That is right. In some instances it may be that some of the larger shippers in California had their own arrangements outside of Mr. Earl.

Q. But generally speaking you have described the situation?

A. *Generally speaking, I have described the situation. And I want to add that the chief reason or chief objection on the part of shippers to our taking the routing in our own hands was that they were no longer able to sell the business and get rebates.*"

Mr. William A. Bissell, Assistant Traffic Manager of the Atchison System, testifies as follows, at pages 864, 865:

"Q. By whom were these rebates paid, if you know?

A. They were paid by the car lines.

Q. And to whom?

A. Oh, everybody.

Q. Well, I mean, to what class of people, if there was a class?

A. To the people that controlled the business. Sometimes that was the people that owned it and sometimes it was not.

Q. You mean that sometimes the shippers controlled the business and sometimes they didn't?

A. That is what I mean.

Q. Well, do you know who controlled the business when the shipper didn't?

A. Why, frequently the parties to whom it was consigned controlled it.

Q. Do you know whether the car lines ever controlled it?

A. Yes, they did control a good deal of it.

Q. In what way, can you tell?

A. By payment of rebates.

Q. Do you mean by that that the shippers gave up the routing as a consideration of receiving rebates?

A. Yes, sir; that is just what I mean.

Q. And do you know that to be the case—to have been the case.

A. I do."

Again, at page 866, he says:

"Of course, you understand that the rebate—the result of the rebate system is that when it was in vogue that we all gave away so much money and got down to a parity; in the end, we were no better off than we were on the start."

In speaking of the great dissatisfaction with the rebate system, Mr. Bissell said at page 868:

"Q. Well, what was the result of the practice as to being satisfactory or otherwise?

A. Well, it was very unsatisfactory. It was unsatisfactory to everyone; unsatisfactory to the lines between here and Chicago, to the initial lines that originated the business, and also to the connections.

Q. Did your eastern connections express dissatisfaction about it?

A. They expressed dissatisfaction to me every time I talked to them; but they were afraid to take any steps that would debar them from this business. They felt that

they had to, in order to maintain their prestige, carry a certain amount of this business.

Q. Well, what do you mean by that?

A. Well, any man that is at the head of the traffic department of a railroad does not want his competitors to get away with all the orange business, or all of any other kind of business. He wants his share, even if he does not make any money out of it.

Q. So that they would take it notwithstanding that the rebates might reduce the profits to little or nothing?

A. Yes, sir."

Mr. Edward Chambers, General Freight Agent of the Atchison System, gives in his testimony a very clear description of the situation prior to the exercise of routing by the initial carriers and he says at pages 890, 891, 892, as follows:

"Q. Well, do you know anything about the giving of rebates that was in practice before January, 1900, in southern California on citrus fruits?

A. Rebates were generally paid prior to January.

Q. By whom were they paid and to whom?

A. Generally by the car lines to the shippers.

Q. How many car lines were there?

A. Oh, there was—in December, 1899, I think there were four private car lines, the Continental Fruit Express, and the Fruit Growers Express, and the Santa Fe Refrigerator Line and the Overland Fruit Despatch, as I remember it.

Q. To whom did the car lines pay these rebates?

A. They paid them to the shippers.

Q. And do you know where they got the money?

A. Got the money from the railroads.

Q. In what way, if you know?

A. Well, generally the plan was to get an excess mileage, that is, additional mileage allowance. The standard mileage for private car lines is three-quarters of a cent west of Albuquerque. That is speaking for the Santa Fe. And east of Albuquerque it was one cent a mile. This allowance was made to all private car lines handling perishable freight. Now, the lines east of Ogden and El Paso paid one cent per mile. The car lines would arrange with the railroads for an allowance, say, of a cent and a half a mile, and agree, in consideration, they would give the railroads a certain amount of business. And out of that excess mileage allow-

ance they would pay the shipper. They would go to the shipper and contract with the shipper for the routing of his business, and route the business over the lines with whom they had arrangements for additional mileage.

Q. Then, the railroad company would pay to the car line an excess per mile on the mileage of the cars ?

A. Yes, sir.

Q. And that money was used by the car line to pay rebates ?

A. To control it.

Q. Well, where did the car line get benefit from that ?

A. Well, the car line would go to the shipper and make the best deal they could. They would pay him, say, for the routing from California to Chicago, fifteen dollars a car; maybe ten dollars a car; maybe twelve dollars and a half; and east of Chicago more. The further distance away from California, the greater rebate they could pay. The car line got the difference between what they contracted with the shipper for the routing for and what was allowed them by the railroad as excess mileage. That would be their profit on the transaction.

Q. *Then, under that arrangement, the car line did the routing and not the shipper?*

A. *The car line absolutely did the routing.*

Q. *Do you know that?*

A. *Yes, sir.*

Q. Do you know of any shipper who was prevented by any car line from routing his goods, citrus fruits?

A. I know a number of them. But one that I remember in particular with the Arlington Heights Fruit Company at Riverside. Well, Prenda is the load station on the Southern California railway. That station is an exclusive station on the Southern California railway. And this was in 1897 and 1898. The entire business, I found, of the Arlington Heights Fruit Company was going to the Southern Pacific at Colton, thence their line to El Paso and Texas and Pacific beyond there and its connections. I went to the manager at that time of the Arlington Heights Fruit Company, and said to him that it didn't look exactly right to have his business going over the lines of the Southern Pacific when he was located on our lines and expected us to do a good many favors for him in the handling of his various business. He answered me that it

was not his fault; that when he made the arrangement for the routing of his business with the Continental Fruit Express they had told him that they would route his business largely over the Santa Fe, but that he started to route his business over the Santa Fe lines and the manager of the Continental Fruit Express objected and insisted that he route it care of the Southern Pacific at Colton via El Paso. He also stated to me that he preferred the Santa Fe line; that he had always heretofore sent his business that way and was willing then to do anything he could to turn the business to the Santa Fe line. That year I think the Arlington Heights Fruit Company controlled about five hundred carloads of citrus fruit. I then called on the manager of the Continental Fruit Express to find out what the trouble was, and I soon learned. He said to me that if the Santa Fe Railroad would allow the Continental Fruit Express excess mileage amounting to ten dollars per car to Kansas City, and twelve dollars and a half per car to Chicago, that the business of the Arlington Heights Fruit Company would be sent over the Santa Fe lines, otherwise the Continental Fruit Express could not afford to let the business

go over the Santa Fe lines, as they had contracted to pay the Arlington Heights Fruit Company a certain amount per car for the routing. The case of the Arlington Heights Fruit Company is a fair example of all the other business.

Q. To your knowledge? To your knowledge?

A. Yes, sir.

Q. What did you do about this?

A. Well, we were obliged to meet the situation. We had to satisfy the Continental Fruit Express, and we did so and got the business.

Q. Then, when the shippers were receiving rebates, they were not, as you understood it, in control of the routing of their fruits. They surrendered that routing as a price of the rebates?

A. They surrendered the routing to the car lines."

Again at page 894 he testifies:

"Q. *Well, you don't consider that the shippers ever routed the business?*

A. *Not to my knowledge. That is the great bulk of the business.*

Q. *Did you, as a traffic man, when you wanted more business, wanted business that*

you thought should come to the Santa Fe lines, consult with the car line companies to get it?

A. *Always, before that.*

Q. *And did you find that they were the people who handled it and controlled it?*

A. *I did.*

Q. *The car line companies then routed the citrus fruit traffic before 1900?*

A. *Yes, sir.*"

Mr. William Sproule, the Freight Traffic Manager of the Southern Pacific Company, testifies very fully upon this matter, and says at pp. 914, 915, 916 of the record as follows:

"Q. Are you familiar, in a general way, with the conditions prevailing in reference to the transportation of citrus fruit from southern California prior to the first of January, 1900?

A. Yes, sir.

Q. Now, in a general way, what were the conditions prevailing in that behalf with respect to rebates?

A. The conditions for several years had been growing worse in that respect, until in 1898, it became a very serious question, and in 1899 became intolerable, so that some

remedy must be had. Do you want me to explain at length what I mean by that?

Q. I wish you would, yes.

A. Well, the demoralization was one of development. At first certain roads came in that hadn't been sharing in the orange business, and which by reason of their location would not readily obtain any material part of the traffic. They came into southern California and offered shippers a certain number of dollars per car, or on some similar basis, for every car that the shipper would send over their road. The effect of that was to divert the business from the lines that had normally been getting it and which were in the natural direction of the traffic, that it would take at the natural instance of shippers, owing to those being the lines that could render the most direct service—it was being diverted to these other roads that previously had little or no share in the traffic. The result of that was of course to immediately create consternation among the roads that were being deprived of it. It had the further effect of complicating relations with the car lines. Particularly so with respect to cars under refrigeration. The car lines had made their arrangements for refrigeration by the usual routes, the routes

that the oranges normally took, only to discover that they were called on to refrigerate the cars by routes that the fruit had never taken, or had taken in such trifling quantity as not to count in the general result. With respect to returning the refrigerators, the car lines found, and the carriers that had the car lines under contract for car supply found, that the cars could not be got back with expedition. There was trouble about that. The roads having cut the rate in order to get business didn't have the same interest to get the cars back that they had to get the revenue loads. Out of that grew a condition, gradually, quite aggravated, in which the car lines made up their minds that if this thing were to be handled in that way there was no reason why the car lines should not get in and control the movement of these loads instead of having the isolated roads come in and do it for them. The shippers lent themselves readily to that, because instead of doing business with various roads and having to do a lot of reporting and accounting in connection with those deals, they could make their arrangements with one car line, that is, one of the several car lines that were engaged in the business. These car lines were prompted

to enter into the deals, not merely by a desire to control—to have some direction over the routing of their own cars, but also out of a jealous desire to secure for the cars they represented an adequate share of the traffic. Otherwise the competing car line might and would make these deals with shippers and divert the business from them. The C. F. X. and F. G. E. car lines on our lines, for example, were bitter competitors. The Santa Fe Fruit and Refrigerator lines operating on the Santa Fe and the F. G. E. also operating on the Santa Fe were bitter competitors, and each car line competed with the other actively. So that their self interest forced them into this arrangement. The shippers took to it. I use the term " shippers " in a general sense. Whoever was the party that controlled the load in the car, whether it was the actual consignor or the consignee or a fruit exchange representing the grower, or whoever it might be that controlled the load. It had gradually got to a place in which the rebate thus created routed the car.

Q. Now, let me ask you, if you will permit to interrupt you at that point. You say the rebate routed the car. Through what instrumentality or operative agency,

as in the evolution of this practice of rebating, was the rebating principally effected through the roads themselves or ultimately through these car lines?

A. It began with the roads themselves, the minor roads, roads that had not been in the traffic and desired to get into it, but by reason of there not being desirable routes found that it was necessary to pay the shipper a bonus in order to get him to use that road. That was the beginning of it. The evolution of it, as I have said, was through the car line, then, finding that these arrangements interfered with their arrangements, firstly, as to refrigeration; secondly, as to the return of the cars, the car line having an interest in that so as to keep their cars as busily occupied as possible, in order that they might get the mileage out of them that would be necessary to remunerate them for the service of the car in the traffic. In the refrigeration, I should say their interest was that they had contracts with the carriers. Speaking for the Southern Pacific, they had a contract with us, under which they were liable for the refrigeration and for any damages resulting from failure to refrigerate. They were responsible to the growers directly, and to us indirectly, be-

cause we stood back of the shipper if the refrigeration was imperfect. Hence, if these cars were being taken off the routes upon which they made their arrangements for refrigeration, being the routes the shippers had hitherto used, and which were generally recognized, it interfered with their arrangements completely. Having made their arrangements, then, with one set of roads, they had to turn around and make new arrangements with another set of roads, perhaps on a notice entirely inadequate or no notice at all. The shipper would simply tender this car and say he wanted it routed a certain way. That, then, was the motive as to refrigeration. The shipper paid the car line for the refrigeration. That is the only service on the part of the car line in the orange trade for which the shipper has to pay—for the car. If it moved under ventilation there is no charge made to the shipper for the use of the car. But on the other hand, on those cars too, the difficulty was to get them back. Keeping the cars moving in this service is an endless chain. Not only must they be loaded and go out but they have got to be kept moving in both directions. And the interest of the car owner, the car line, in that car, is to keep that movement continu-

ous. And we cultivate that because it helps us to get the cars back. But under those conditions neither we nor the car lines could get the car returned with equal promptness, because the business was done on a basis that caused the roads handling it to feel that they were not warranted in giving the empty cars satisfactory service, such as Mr. Hibbard has just described for the Santa Fe. They said it was too expensive, and so the cars would move along the same as any other empty returning home, which was entirely ineffective for our purposes. The consequence of that, on the other hand, was that under that system there was, every season, a cry, a pronounced cry, of car shortage and car famine. Now, as to the agency through which it was done. The evolution of it was that it was easier for the party owning or controlling the carload of oranges to do his business with a car line than in any other way, and he just followed the line of least resistance and did it that way. Further, he came more into contact with car line men than he did with others, because all the refrigeration was done through him, and it was an easy and natural way of doing it.

Q. Well, then, by a sort of natural selec-

tion the car-line owner became the final actor and agent in the matter of rebating to the shipper?

A. Yes, sir. And the car owner, on the other hand, was forced into it largely by force of circumstances, as I have described.

Q. Exactly.

A. Growing out of that, he got into a place in which he became a competitive solicitor of rebates—or, in order to obtain the money wherewith to pay rebates. And he worked with all connections, on the basis of either so much per car, or an excess of car mileage, or some other device, generally car mileage, that would give the money to pay the shipper. Now that developed until our position became intolerable, as I have already said." * * *

A clear statement of the situation prior to the adoption of the routing rule is found at p. 1051 of the record in the affidavit of Mr. W. A. Bissell where he describes the growth of the rebate system as follows:

"Prior to the enforcement of the routing rule and under a system of through transportation upon a through rate, the integrity and lawful maintainance of such rate has been attacked and vitiated by unlawful com-

petition and struggles for business among the connecting lines of the initial carriers. The distribution of the commodities by shippers among the connecting lines was not determined by lawful competition in the price of transportation, for such price was a fixed, uniform and published price, nor was such distribution determined by competition among connecting carriers in the matter of services and facilities. The course of transportation was fixed by secret cutting of the lawful rate—by the offer and acceptance of illegal rebates which grew to such an extent that scarcely a car of citrus fruit was hauled from southern California upon which an unlawful deduction from the regular tariff was not made. This unlawful competition by way of rebates and violation of the commerce act, while at first operating between connecting lines and shippers, settled down into an arrangement between connecting lines and the private car lines, and such private car lines, operating with the funds illegally paid them as rebates by the connecting lines, purchased from the shipper the routing of the commodity and thereupon routed such commodity in accordance with the rebates. The initial lines, under these conditions, were powerless.

> The connections competed unlawfully for the business. The shipper sold his privilege of distribution among connecting lines and the rebate, as handled by the car lines, routed the commodity. It was to break up this unlawful system and to maintain the rate according to law that the initial carriers insisted upon the routing provision in the joint tariffs. With the control of the routing in their hands, the practice of rebating was extinguished."

The testimony which we have quoted shows beyond any question that prior to January, 1900, the shippers did not exercise the right of routing their oranges beyond the terminals of the initial carriers, but sold that right to the private car lines. These private car lines having purchased such right of routing at the lowest figure possible from the shippers, sold this routing to the highest bidder among the Eastern lines, pocketing the difference between what they succeeded in exacting from the Eastern lines and what they were obliged to give up to the shippers. We have, therefore, prior to January, 1900, the railroads at the mercy of private car lines which claimed to be unhampered by any statutory control. The demoralization attendant upon

the business of the carriers being subservient to a private car line, is obvious, and is certainly made unmistakably clear by the witnesses whose evidence we have referred to. To do away with this extraordinary situation was the purpose of the railroads when they adopted the right of routing.

THE REASON FOR THE EXERCISE BY THE INITIAL CARRIERS OF THE RIGHT TO ROUTE BEYOND THEIR OWN TERMINALS.

It is not apparent what possible advantage or reason there could be for the initial carriers adopting the routing rule outside of the reason given by them. The amount of business which they would carry was entirely unaffected by the question of who routed the oranges beyond their terminals. They were the only lines over which the orange cars could go for distribution at eastern points. Their carriage would be the same, whether the oranges were routed by shippers, carriers, or by private car lines. It is therefore not obvious what basis there is for any suspicion of improper or ulterior motive on the part of the roads which adopted the routing rule. Certainly their testimony was clear upon the point

as to why they did determine to route the orange cars, and is absolutely undisputed.

W. G. Barnwell, Assistant General Freight Agent of the Atchison System, testified at page 440 of the record as follows:

"Q. What was the reason for your reserving the right to route since January, 1900, in cases where you thought you should route?

A. To avoid any possibility of irregularities in line with the tariff governing at that time.

Q. Well, be more specific, if you can.

A. Well—

Q. What irregularities do you refer to?

A. Rebates, for instance.

Q. Were they existing at the time, these irregularities?

A. They were prior to the time that the initial lines took control of the routing.

Q. And have they existed since?

A. Not to my knowledge."

Mr. Edward Chambers, the general freight agent of the Atchison System, testified at page 893 as follow:

"Q. Now, what was your purpose—first, did you have anything to do with Mr. Bissel

in the matter of assuming control of this routing? Did you co-operate with him?

A. Yes, we consulted together.

Q. Well, what was your purpose in assuming control of the routing?

A. It was to prevent the paying of rebates. I recommended it to Mr. Bissel myself.

Q. By the payment of rebates, you mean the—in effect the cutting of the published tariff rates?

A. Yes, sir.

Q. Did you have any other purpose? Was this the sole purpose?

A. That was the sole purpose. My judgment was that that was the only way in which it could be stopped. We had tried various ways before that."

Mr. Paul Morton, in his testimony, speaks as to the change of routing as follows, at page 117:

"Q. Are you familiar with the change as to routing that was made?

A. I am?

Q. When was that? January 1st, 1900?

A. January 1st, 1900.

Q. Did you have anything to do with the change of the practice as to routing?

A. I approved of it?

Q. And for what reason was the change made?

A. Well, the change was made for many reasons. In the first place, the citrus fruit business of California, to a very large degree, was being handled by the fruit companies interested in private car lines, and it was very unsatisfactory both to fruit growers and fruit shippers who did not have cars of their own. We had a great many protests from the citrus fruit men against their fruit being shipped in cars belonging to their competitors in the fruit business, and they besought us at various times to supply other cars for them to ship their fruit in than the cars belonging to Earl and Armour." * * *

(P. 118) Q. Well, you mention that as one of the reasons why the change of routing took place?

A. The routing to a large extent prior to this change, while apparently in the hands of the consignor, was in the hands of the owners of these private car lines. * * *

(P. 119) Q. Well, how could the action you took in January, 1900, the exercise of that power of routing, have anything to do with eliminating the trouble referred to in the letter you read?

A. Mr. Earl on account of the large business that he controlled himself and on account of owning and to a certain degree directing the movement of these cars in which other people's fruit was loaded, sold the business to the highest bidder.—* * * When I say sold the business I mean that the line that would give them the largest rebate—

Q. Railroad Line?

A. The railroad line that would give them the largest rebate secured the business. * * * (P. 121) Now it cost our company the last year, the year preceding 1900, quite a large amount of money to meet this competition, and shippers in Southern California who did not get the full benefit of this reduction and who had to divide it with Mr. Earl and others, naturally were indignant, *and it was in order to prevent that state of affairs solely and for no other reason in the world than to maintain legal rates that we took the routing of this business in our own hands.*"

Mr. William A. Bissel says as to this point p. 876:

"Q. What was the object of the Santa Fe companies in preventing this giving of re-

bates and in putting forth the rule to control the routing?

A. The object was to be relieved of the dangerous practices that were in vogue, to obtain control of their own equipment or the equipment that was assigned to their line over their own road, and to enable them to get fair compensation for the service that they were performing without violating the law either directly or indirectly."

There is nothing in the record to show any ulterior or other reason whatever on the part of the initial carriers for exercising as to the orange traffic the right of routing beyond their own terminals.

We therefore respectfully submit that the routing was done by the initial carriers for the sole purpose of destroying the practice of giving rebates, and that no other motive is suggested by the testimony for the action of the carriers in that regard.

THE REBATE SYSTEM WAS BROKEN UP BY THE ADOPTION OF THE ROUTING RULE.

Shippers as well as carriers agree that since January 1, 1900, neither the car lines nor the

shippers have been able to collect any rebates from the Eastern lines or from any other source.

Mr. Naftzger, the President and Manager of the Southern California Fruit Express, the original complainant before the Commission, testifies as follows at page 806 of the record:

> "MR. HERRIN: You have paid the full tariff since January 1st, have you not, this year, refrigeration tariff?
>
> MR. NAFTZGER: I think so.
>
> MR. HERRIN: Have you got anything back?
>
> MR. NAFTZGER: No, sir.
>
> MR. HERRIN: Isn't that the trouble in this matter?
>
> MR. NAFTZGER: That is one of them."

Samuel H. Westfall, an orange shipper testifies in answer to questions from one of the Commissioners, as follows (p. 832, 833):

> "COMMISSIONER CLEMENTS: Are you receiving rebates now from anybody, any company, any source?
>
> MR. WESTFALL: No, sir.
>
> COMMISSIONER CLEMENTS: No commission or anything, directly or indirectly, under any name, by which you get back any of the money you pay?

MR. WESTFALL: Nothing.

COMMISSIONER CLEMENTS: Nothing for refrigeration or for freight?

MR. WESTFALL: No, nothing."

Mr. Earl, President of the Continental Fruit Express and the Earl Fruit Company, says at page 848, as follows:

"MR. HERRIN: Have you paid any of these rebates or allowances since January 1, 1900, Mr. Earl?

MR. EARL: No, none have been paid or promised.

MR. HERRIN: Has the Continental Fruit Express paid any such rebates or allowances since January 1, 1900?

MR. EARL: No. * * *

COMMISSIONER CLEMENTS: Are you receiving any now from the eastern connections?

MR. EARL: No, sir.

COMMISSIONER CLEMENTS: Or have you any understanding that they are to be paid hereafter?

MR. EARL: I know of none.

COMMISSIONER CLEMENTS: Would you know if there were any to be paid?

MR. EARL: I probably would. The railroads are routing these cars now; they are

going over all kinds of routes. We have no control over the routing. Those eastern roads can't buy the business if they wished to do so. They can't buy it.

COMMISSIONER CLEMENTS: You mean the initial roads control them?

MR. EARL: Yes, sir; the initial lines route the cars. The car lines have nothing to do with it any more.

COMMISSIONER CLEMENTS: Since that condition of things has been brought about you keep all of your mileage and refrigerating charges?

MR. EARL: We hope to, yes, sir.

COMMISSIONER CLEMENTS: Are you doing it?

MR. EARL: Yes, sir.

COMMISSIONER CLEMENTS: These shippers are not getting any of that drawback?

MR. EARL: No, sir; not from the Continental Fruit Express.

MR. HERRIN: Have you any reason to believe that any of these other car lines is now paying any rebates since January 1, 1900?

MR. EARL: No, sir; I don't think so. I have seen no signs of it. If they had been I think we would have known of it.

MR. HERRIN: You would have found some symptoms of disease?

MR. EARL: *I think there is nothing of* that kind now."

Mr. Arthur Gregory, another fruit grower and shipper, was examined before the Commission, and testified as follows (p. 853):

"MR. STUBBS: Have you had offers of any rebates this season, before or since the first of January?

A. No, sir.

MR. STUBBS: Have you had the promise of any rebates before or since the first of January of this season?

A. Yes, sir.

MR. STUBBS: And you have not received any rebates this season, either before or since the first of January?

A. No, sir.

MR. STUBBS: And do not expect to receive any?

A. Don't expect to."

Mr. E. S. Moulton, a shipper and packer of oranges, testifies at page 861, as follows:

"Q. Well, have you any arrangement, or has your company, the Consolidated Forwarding Co. or any firm or person a member thereof, an arrangement, direct, or indi-

rect, whereby they are to get any rebates, say, since the 1st of November, with any connecting carrier in the East, or any railroad company?

A. Yes, sir.

Q. They have an arrangement, have they?

A. Yes, sir.

Q. Are they able to effectuate that arrangement now, since the first of the year?

A. No, sir; you said 1st of November.

Q. I said the first of November, and I ask you, if they are able now to effectuate that arrangement, since the 1st of January? Are they able to carry out and enjoy the results of that arrangement?

A. No, not since the 1st of January.

Q. That arises from the railroads exercising the routing of the cars?

A. I don't know. I presume that that is it.

Q. You do know that the routing must be in your hands in order to realize on that rebate arrangement, don't you?

A. Yes."

The testimony of the appellants is to the same effect that since the first of January, 1900, no rebates whatever have been paid. Mr. Morton upon this point says at page 127 of the record:

" Q. Now, you have stated the purpose of taking into your hand the routing of this citrus business, namely the stopping of rebates and this secret cutting of the published tariff rates. Was this stopped?

A. It was.

Q. Definitely and fully?

A. Absolutely.

Q. And in the opinion of the Interstate Commerce Commission the statement is made that it is not clear how that would stop it. Could you illustrate or explain how?

A. Well, every connection was given to understand that in case they were found offering concessions for this citrus fruit business after the first day of January, 1900, that we would see to it that the business was diverted from their lines; and I remember going so far as to say that if I found anybody cutting our through rates secretly after the first of January, 1900, that we would not only divert the citrus fruit business from them, but we would take away other business; that it was our intention that the published tariff rates should be absolutely maintained. And that was done in the interest of the small shipper and in the interest of not having any discrimination in that business."

Mr. Edward Chambers, whose testimony is very clear and convincing, says at page 202, in answer to questions by the counsel for the Government, as follows:

"Q. Do you know of any rebates that have been paid by the Santa Fe or the connecting lines of the Santa Fe in the East made to orange shippers or growers or packers during the present year?

A. I do not.

Q. Do you know of any such rebates during the past year?

A. No. sir.

Q. How long since you have known of any rebates having been paid?

A. About three or four years.

Q. You have known of no rebates having been paid in three years by either the Santa Fe or by any other road arising out of the citrus fruit business? Is that so?

A. No. sir. I believe in the past three years the rates have been absolutely maintained.

Q. What date? Can't you fix any dates?

A. Since the railroads took the routing of the citrus fruit into their own hands. I think it was January 1, 1900."

Mr. Sproule, the General Freight Agent of the Southern Pacific Company, says at page 290, as follows:

"Q. To the best of your knowledge and information, has there been any payment of any rebates or drawbacks, or any other bonus given by any railroad company for the transportation of fruit to any shippers within the last three years?

A. Since the first of January, 1900, no, there has not been any to my knowledge.

Q. Have any such rates been paid indirectly?

A. Not to my knowledge.

Q. I would say have any such rebates been paid indirectly.

A. I don't believe there have."

Mr. Bissel, the Assistant Traffic Manager of the Atchison System, says at page 876, as follows:

"Q. Did the enforcement of this rule stop the giving of rebates?

A. Absolutely. * * *

Q. You know that?

A. Yes, sir; I know that to be a fact. It absolutely prevented the necessity of paying rebates."

Mr. Sproule, at pages 920, 921, of the record, says:

"Q. So far as you know—

A. So far as we have any knowledge.

Q. —have any rebates been paid in the citrus fruit business since the tariff—with this condition, that the right of routing should be reserved to carrier?

A. I have every reason to believe that from January 1st, 1900, until this date, there has not been a nickel paid on citrus fruits.

Q. Nothing of that kind has been brought to your notice?

A. It has completely stamped it out.

Q. Is it a fact, so far as your observation goes—I think there is some testimony to that effect here—that prior to the enforcement of this routing rule, generally speaking, every carload of citrus fruit paid more or less in rebates?

A. In 1899, I doubt whether there was any carload of citrus fruit that moved out of southern California without somebody getting a rakeoff on it, although the shipper himself might not get it at all."

It would seem that but one conclusion can be drawn from this evidence, and we, therefore, feel safe in our assertion that it must be conceded

that (1) rebates were paid prior to January, 1900, (2) that the routing rule was adopted to break up rebates and (3) that the rebate system was broken up, and no rebates have been paid since January, 1900.

The routing rule having admittedly accomplished a great good, it now becomes important to see if it resulted in any evil. Were the orange shippers really and substantially affected by it in any way at all? Did it change their relation to the cars shipped by them? Did they really have any less or different control over the shipments made by them than they did before?

INTERESTS OF SHIPPERS UNCHANGED BY ROUTING RULE.

It is significant that no growers of oranges have made any complaint before the Interstate Commerce Commission, and the testimony of the few who have been examined has in no way shown that their business has been affected one way or the other by the adoption of the routing rule, excepting that they have not received the rebates which they formerly did.

It is somewhat difficult to understand just what

this proceeding is all about, unless we recall the the testimony of Mr. Naftzger, the President and Manager of one of the complainants which had received about $175,000 of rebates in four years, who says at page 807, that one of the troubles in this matter is that his Company, the petitioner in this proceeding, was not getting rebates.

Certainly there is no practical change in the situation since January, 1900, so far as the routing of the oranges is concerned. Before that time the shippers surrendered such right to the private car lines in return for what they might or might not get from the car lines in return therefor. Even if, however, they had themselves exercised the right of routing prior to January 1, 1900, and had not sold it to the car lines, we do not see how by the adoption of the routing rule they have lost any advantage which they had before. The important points to the shippers in routing are to have (1) the right of diversion; (2) the right of naming the towns and cities through which the car should go on its way to final destination; and (3) the right to select the delivery line at the point of destination.

It is not clear what else there is which is of any importance to the shipper, except the points above indicated. As to the selection of the delivery line, Mr. D. W. McLeod, a witness in behalf of the Interstate Commerce Commission, testifies at page 252, as follows:

"Q. Now, at the present time what delivery do you get on shipments to New York?

A. We get Erie.

Q. The same thing?

A. Yes, sir.

Q. What one do you get on shipments to Detroit?

A. Well, I don't know that there is a material difference about that. I have not particularly noticed that.

Q. What one do you get on the shipments to Buffalo?

A. We get the Lake Shore, I suppose, as usual.

Q. The same as heretofore?

A. Yes, sir.

Q. And shipments to St. Louis?

A. Get the Missouri Pacific.

Q. The same as you had before. And shipments to Boston?

A. We get Fitchburg delivery.

Q. The same as heretofore. And on shipments to Cleveland?

A. We get Nickel Plate.

Q. The same as you had before?

A. Yes, sir.

Q. Then the reservation of the right to ship has not changed the condition that you consider desirable?

A. It makes a big difference in the time it gets there, though.

Q. Yes, but as to the delivery, you have the same delivery as you had before?

A. Yes, sir; on request."

Upon this point, Mr. Fay says at page 837 as follows:

"MR. STEVENS: In other words, you have enjoyed practically the same route since the first of January that you did before, notwithstanding the fact that the railroad company itself has chosen the routes? Is not that true?

MR. FAY: Yes, that is true."

There seems to be no dispute but that the right to divert is permitted as fully as it was prior to January 1, 1900. The witnesses for the complainant agree with the witnesses for the railroads upon this point.

Mr. McLeod, an orange grower and shipper, says at the bottom of page 246:

> "Q. * * * I want to know, generally speaking, since the initial carrier has directed the routing, haven't the requests of the shipper for diversion been acceded to as a general rule?
>
> A. As a general rule, I think they have, yes, sir."

Mr. C. B. Strome, agent and superintendent at Chicago of the terminals of the Atchison System, gives a number of diversions for the years beginning in 1899 at Chicago, from which it appears that almost half of the cars received during the three months of the heaviest shipments were diverted at Chicago for eastern points. He says at page 139:

> "Q. That makes a total of how many received all together in those three months?
>
> A. During the three months for those five years 3,971 cars were received, of which 2,004 were unloaded on our tracks and 1,967 diverted east.
>
> Q. During what months of the year are the heaviest receipts of citrus fruits?
>
> A. During the above months, March, April and May.

Q. In making your figures you took those as the months best representative of the business done?

A. Yes."

A. G. Stearns also examined on behalf of the complainant, who was an orange and fruit shipper, says at page 257:

"Q. The practice to allow diversions is universal, I believe?

A. Yes, sir."

Mr. James A. Everest testifies to the same effect. He was also examined on behalf of the complainant and is a grower of oranges. He says at page 276:

"Q. Yes, and the company so far as that routing was concerned, allowed you freely to divert, did it not, as a general rule?

A. I have had very little trouble so far as diversions is concerned."

Mr. Naftzger, the President and Manager of one of the complainants, says at pages 810, 811 of the record:

"MR. HERRIN: You can divert your cars all right now, can't you?

MR. NAFTZGER: At present in pretty good shape, yes, sir.

MR. HERRIN: Don't you in some cases give the destination of your car, at say Omaha, and then before you get to Omaha, tell them to divert to Chicago?

MR. NAFTZGER: Frequently; yes, sir.

MR. HERRIN: And then when you get to Chicago, tell them to divert to some point farther east? You do that three or four times, don't you?

MR. NAFTZGER: Yes, sir; we seldom do it more than once.

MR. HERRIN: That is a very great advantage to you, that diverting?

MR. NAFTZGER: It is absolutely necessary in the marketing of the crop, in my opinion."

E. S. Moulton, a packer and shipper speaks of this right of diversion and explains how it is done at the expense of the railroads, at page 860, as follows:

"Q. When you receive an offer from one of your brokers, to several of whom you have sent manifests of that particular car, you then divert the car from the original destination to the destination at which the broker who gives you the order resides, or orders the car to be sent to?

A. Yes, sir.

Q. *The railroad companies do that diversion at their own expense, do they not?*

A. *Yes, sir.*"

Aside from the provisions of the citrus fruit tariff permitting diversions, and the testimony of the railroads to the effect that these diversions are always granted, it appears that by reason of the present organization of the system of granting diversions, the privilege is better exercised now than it was prior to January, 1900, and that the cost of it, which is very heavy, is entirely borne by the railroad companies. Upon this there seems to be no dispute.

Mr. Edward Chambers, examined in behalf of the Atchison System, says at page 911:

"Q. Mr. Chambers, it is in evidence here from a number of witnesses that after the routing was taken in charge by you that it was impossible to have fruit diverted as well as it had been diverted when they were controlling the routing as they claimed they were. I will ask you to state what the facts were as to that?

A. The rule was continued just the same as it had been previously. I think if anything the service is improved.

Q. You think that diversions are still

being made as promptly as they were made before?

A. I think they are made to-day more promptly than ever before, on account of the increased wires, telegraph wires, and the general organization of the service.

Q. Who makes the diversions now for shipment?

A. Do you mean who—

Q. What company?

A. With whom the diversions are filed?

Q. Yes.

A. For the Santa Fe Company they are filed with any of our agents in California.

Q. Well, then, does your company make the diversion no matter where the car may be?

A. Yes sir. Always has.

Q. And does now?

A. Always had—the connecting carrier has always had to have the consent of the Sante Fe road before they could change a destination; * * *

(Record, p. 913.) Q. Then so far as the diversions are concerned, they are handled now by your company just as they were before 1900, before you routed?

A. Yes sir.

Q. But you think that on account of

better telegraphic facilities they are handled more expeditiously?

A. And better organization of the system."

The evidence of Mr. Sproule, General Freight Agent of the Southern Pacific Company, upon this point is very clear. At page 924 he says:

"Q. Now, with respect to the right of diversion, that right was very freely exercised by the shipper prior to January, 1900, was it not?

A. Yes, sir; and that has continued to be very freely exercised ever since and is to-day.

Q. Was it not the freedom and facility with which the right of diversion was exercised by the shipper that gave rise to the epithet 'tramp car' as applied to cars of oranges that went out from southern California?

A. Yes, sir. The exchanges for a long time, and subsequently other shippers, to protect themselves, habitually forwarded their cars to a false destination.

Q. A hypothetical point?

A. A hypothetical point.

Q. And between the hypothetical point and the point of origin the car was diverted

freely at the instance of the shipper in search of a possible market; is that correct?

A. Yes, sir; diverted many times, half a dozen times, in transit.

Q. And it was the movements of that car in that way that gave rise to the epithet 'tramp' was it not?

A. Yes, sir.

Q. Has the same freedom of diversion been permitted the shipper since the tariff of January, 1900?

A. Precisely."

Mr. O. L. Rule, the diversion clerk of the Santa Fe System, tells about the situation prior to January 1. 1900, and since that time. He says, at pages 972, 973 of the record:

"Q. Well, it is in testimony here that since January 1, 1900, when the railroad companies have been routing the citrus fruit themselves, diversions have not been so prompt and satisfactory as they were before 1900. I will ask whether you know how they were handled before and after, with respect to promptness?

A. Based on my own experience in the work, I should say most certainly we haven't had anything like the trouble—

Q. Since 1900?

A. Within the last three or four years it has been going more smoothly than it did prior to that time. That I know.

Q. Can you tell whether the relative number of diversions has been increasing from year to year?

A. Why the work is getting heavier every year, but I can't say what it is due to, whether it is due to increase of crop or anything of that kind. We are getting more work each year. I know that.

Q. You mean that the number of diversions is larger each succeeding year than it was the year before.

A. Take the season that closed with last November, we had a great many more than we did the previous year. This year I cannot speak for, because it is too early to tell much about it.

Q. Well, but has there been an increase or not, in the number of diversions from one year to another? Has it been constantly increasing, or otherwise?

A. I think there has been a very steady increase each year."

Again at page 974, he says:

"Q. Well, now, of the cars that are actually diverted, can you state what is the average number of diversions that have been

made on all the cars that have gone over your lines that have actually been diverted?

A. During any one season.

Q. During any one season?

A. Well, take the season that closed the first of last November, I should say we had about 12,000.

Q. 12,000 what?

A. Diversions."

The amount of the diversions of the orange shippers and their burdensome character is well brought out by Mr. Sproule, at pages 945, 946 of the record, where he says:

" * * * So far this season out of four thousand and odd cars which have been moved, out of 4685 cars which have been shipped there have been 4344 diversions, which is almost a diversion for every car. Now, to make those 4344 diversions, there were approximately—there was a minimum of twelve thousand messages sent over the wires. Those messages we have to use the Western Union wires for?

Q. And pay for them?

A. Pay for them. That is, if we don't pay in coin, we pay in kind.

Q. You have a contract about that, haven't you?

A. Yes, we have a contract up to a certain amount for which we return service and give them transportation. In other words, they take it out in trade. Beyond that we have to pay coin."

There is no question as to the shipper being accorded the privilege of selecting the towns through which his cars are to pass. That is allowed by an express circular to the agents of the companies, which reads as follows (p. 801):

"SOUTHERN PACIFIC COMPANY.
PACIFIC SYSTEM.

LOS ANGELES, CAL.,
Feb'y 27, 1900.

To all agents in California south of Mojave and Elwood.

Gentlemen:

It has been decided to allow shippers the privilege of placing on shipping orders or other documents covering shipments of citrus fruit, their preference of certain cities or markets through which they desire cars to pass, providing there [are] two or more lines of railway competing for traffic between each of the various points specified.

You may, therefore, accept on shipping

orders, in accordance with the above, the following notation: 'Would prefer this car pass through ,' naming points.

Should any point be indicated, not served by competing lines, you will please request shippers to omit same.

Yours truly,

G. W. LUCE,

A. G. F. & P. A. So. Pac. Co."

We find, therefore, that the shippers have since January, 1900, had the same rights (1) as to terminal deliveries; (2) as to the right of diversion, and (3) as to the right to select the towns and cities through which their oranges should go on the way east, which they had previous to the adoption of the routing rule by the initial carriers. In other words, the shippers' right to control the routing in the points which affect their interests as shippers is the same as it was before. Further than that, it seems that substantially the same routes are used by the initial carriers beyond their own terminals as were used before, except that when possible more direct routes have been selected.

As to this, Mr. Bissel says at pages 878, 879 of the record, as follows:

"A. As a matter of fact, the majority, or a great share, of the citrus business that is moved since this routing was taken in hand by the initial lines has moved over the same roads that it moved over before. The only roads that have been eliminated from the routing by the present practice are the roundabout roads and roads which possibly might come under the definition of the commissioners there, although I didn't know that there were any insolvent—or roads of doubtful solvency, in the United States at the present time. But the roads that the business is being routed over to-day are the best roads in the country."

It is a little difficult to see what possible complaint there can be from the shippers since the practice of routing the freight was taken up by the initial carriers. The routes are certainly more direct than they were before. Before this Mr. Chambers says at page 895 of the record:

"Q. But in the routing that you gave them, did you give them the most direct routing?

A. Always; yes, sir. That is one of the factors that goes to make up the circular of instructions to agents. Not only the most direct route, but the routes that the ship-

ments can be diverted from the destination —from one destination to another. For example, into Buffalo. We could not send a shipment of citrus fruit into Buffalo over a line that it could not be diverted out from Buffalo to New York, because the market is likely to be off at Buffalo, or overcrowded, and the shipper will want to divert to another market. So, that would be a very serious objection to sending it over a line that could not divert it out of Buffalo, and we would not send over any line leading to Buffalo that could not divert beyond and protect the through rate just the same as if the shipment had started from California and gone through to final destination without any diversion.

Q. Do you know whether, as a matter of practice, the routes that citrus fruit has traveled since 1900 have been more direct or less direct than the routes it travelled before.

A. They are more direct. No doubt about it.

Q. Did the car lines send shipments by roundabout ways, to your knowledge?

A. Well, the car lines would send the shipments over the lines where there was the most profit in it for them.

Q. What controlled their routing, the routes they took, if you know?

A. Their mileage arrangements, largely.

Q. That is to say, the money there was in it as rebates?

A. The money they got from it, the mileage.

Q. What controls the route the fruit takes now?

A. The general service, the time and the ability to divert beyond, and the prompt return of the cars."

There is some testimony given by the shippers to show that the time of transit to eastern points is not so good as it was prior to January, 1900, and there is obviously on the part of the witnesses a desire to in some way connect this delay with the exercise by the initial carriers of the right of routing. Just how the two can have any relation to each other is not made apparent.

The table furnished by Mr. Naftzger on page 982 of the record giving a comparison between the time of transit at a selected period prior to January, 1900, and a period subsequent thereto, is hardly a fair one. The time taken prior to January, 1900, is as long ago as 1895 when the business of the railroads was at its lowest ebb and

there was no congestion of traffic on any road in the United States. The time selected since January, 1900, was when the prosperous period of the railroads was gaining its first impetus and the business of all roads was so hampered by the natural congestion, resulting therefrom and the inability to obtain equipment to move the freight offered, that the usual time of transportation over such great distances as from one side of the continent to the other was entirely out of the question. Of course, Mr. Naftzger pretends in his evidence that the times selected by him were especially taken by him in order to be as fair as possible to the railroads, but it is somewhat odd that in his consideration for the interests of the appellants he did not remember the two great facts pointed out by us, which render the statement of no value.

This table or statement is also of no significance as to the Southern Pacific, as the time of transit via Southern Pacific prior to 1900 is not given. It is true that counsel for the Government try to make the witness say that prior to 1900 the time of transit over the Southern Pacific was about the same as that over the Atchison, but his efforts did not meet with any great suc-

cess, and the witness substantially says that he did not make the comparison, for the reason that he had no records from which to do it (Record, p. 984).

That it now takes longer to transport oranges from California to eastern points than it did prior to the routing rule, is not connected with or the result of the exercise of the routing by the appellants. The orange traffic is given the preference over everything on the road except the passenger service (Record, p. 925). Every effort is made to get it forward, and it now goes forward just as quickly (if not more quickly) in proportion to other traffic, as it did before January, 1900. The delay, such as it is, is due to the general congestion of all traffic, and the inability of the railroads to handle their business any more expeditiously. The general traffic conditions on the railroads are shown by the witnesses for appellants to be alone responsible for the one or two days' delay in reaching the east, and it is a delay which has not been connected, and it is difficult to see how in any way it could be connected, with the routing by the initial carriers beyond their own terminals.

As to the delay in transit, Mr. Morton says

that it was due to congestion of business, and testifies at page 131 of the Record:

> "* * * For the last five years you know the railroads of the United States for the first time in their history have been behind the wants of the country, and they have all had trouble.
>
> Q. It has been growing steadily, has it not?
>
> A. The worst trouble in the United States has been on the very best railroad in the world; that is, the Pennsylvania railroad. They could not build—the shops of the country have not been able to build railroad equipment and power fast enough to take care of the business of the country. * * * Well, all I can say is that there has been a very large increase in our business steadily ever since 1896. I believe that our business in 1903 showed an increase over 1896 and 1897 of about 200 per cent."

Notwithstanding this delay from congestion, which was unavoidable and in no way connected with the routing of the freight by the carrier, Mr. Morton points out that the citrus fruit traffic had been handled with more expedition than any

other business and at greater cost. He says at page 133:

> "Q. Relatively, then, you mean to say that the citrus fruit business has been handled with more expedition than any other business you have?
>
> A. It has been handled with more expedition and at greater cost than any other business we have. * * *"

Again, at page 136, he says:

> "Q. How does the schedule time east of Chicago compare during the last two years with the time prior to 1900?
>
> A. I could not tell you except in a general way. I know the time east of Chicago has been anything but schedule in the last two years because there has been such a congestion of business that it has been almost impossible for the railroads to make time."

That the time of transit is not so important as it seems upon first consideration of the subject is evident from the fact that the shippers themselves were the cause of great delay in the unloading of their cars. The average of such delay, which is due entirely to the shippers and not in

any way to be laid to the railroads, amounts to over six days on every car unloaded at Chicago in the five years ending with 1903. As to this Mr. C. B. Strome, testifies at pages 139 and 140 of the record as follows:

"Q. In the three months mentioned in 1899 what showing have you?

A. In 305 cars unloaded on track there were—

Q. 305 were unloaded you mean?

A. Yes.

Q. And how long were the 305 cars delayed on an average if you can tell, before unloading?

A. They were delayed on an average 7½ days. That is not counting the day of arrival.

Q. In 1900, in the months mentioned how many cars were unloaded on your track?

A. 412 cars and they were delayed on an average 6.49 days.

Q. In 1901, how many cars were unloaded on your tracks?

A. 465.

Q. And what was the average delay in unloading?

A. They were delayed on an average 5 days.

Q. In 1902?

A. 317 cars, delayed on an average 5.81 days.

Q. In 1903?

A. 505 cars, delayed on an average 6.28 days.

Q. In the five years mentioned how many cars have you unloaded altogether?

A. 2,004 cars, delayed on an average 6.14 days. * * *

Q. Can you state how long the cars that were received here and not unloaded on your tracks but diverted were delayed before being diverted?

A. They were held on an average about the same length of time.

Q. And how long, if you can tell, have cars been held here before being unloaded or before being diverted?

A. In making up these figures I have found cars delayed as long as thirty-eight days.

Q. These delays that you have spoken of, both as to cars unloaded here and as to cars diverted, were occasioned by handling by the consignor or consignee, or by you?

A. They were delayed waiting for orders from the consignee as to what to do with the freight.

Q. What I want to put directly is whether these delays were caused by you in any way?

A. No, sir."

It is pertinent here to notice that the cars while delayed by the shippers required constant attention from the railroads. As to this Mr. Strome says at page 141 of the record:

"Q. Now what attention do you have to give to those cars that are held up on your tracks here, if any?

A. Well, it depends a good deal on the weather. In the winter time we have to see that they are kept from freezing, as far as possible protected from the cold weather.

Q. How do you protect them from the cold in the winter?

A. We have car heaters; Economy car heaters.

Q. What are they—oil stoves?

A. They are a sort of salamander or oil stove, and we put them in the ice tanks of the cars.

Q. In the severe weather?

A. In the severe weather. * * *

Q. What examinations do you make of the cars, and how frequent?

A. Every day we have to open them and

take the temperature, and examine them and see that they are kept in good shape.

Q. Is any charge made by you for this daily examination, and for this heating and care through the cold weather?

A. No, sir.

Q. That is all gratuitous?

A. Yes. * * * When it is received under ventilation we have to look after them just the same, and examine them daily and open and close the ventilators according to the temperature, and open the side doors in order to cool them off when the weather is hot.

Q. So that in both cold and warm weather they require the special attention?

A. Yes, sir."

At page 205 of the Record, Mr. Chambers says:

"Q. In a general way what has caused the slow time you are making the present season on this citrus fruit business?

A. The heavy traffic of all kinds on the system, both local and through. * * *

Q. Were you limited by the lack of motive power to move the traffic offered?

A. Yes, generally.

Q. Was that true of all sorts of freight?

A. Yes sir. I will say we gave preference to the citrus fruit traffic over all kinds of traffic. The other traffic was very much more delayed than the citrus fruit traffic.

Q. You gave a special rapid service for the citrus fruit, being perishable fruit?

A. Yes, sir.

Q. Well, is there anything permanent to these conditions?

A. No, sir; it is getting better with us right along.

Q. Do you expect next season to resume your normal time?

A. Yes, sir; we expect during this season to do so."

Mr. Chambers also points out that the delay in transit caused by the congestion of the railroads is of little consequence in comparison with the delay due to shippers. At page 210, he says:

"A. Of course there are other conditions that delay the cars. The markets get glutted, and I have known where the freight remained in the car as long as twenty days at a destination in New York. This year we had 200 cars at one time standing on our tracks at Chicago that had been there all the way from five to fifteen days.

Q. Whose fault was that?

A. The shipper, the consignee; probably awaiting better market conditions. The weather had something to do with it.

Q. It was no fault of yours?

A. No, sir. We had carried it to the destination.

Q. But the shipper for some reason does not give the orders to unload, awaiting for market conditions to improve and for other reasons and a good deal of the time is occnpied in that way?

A. Yes, sir. I think yesterday I got advice that we had 40 cars on our tracks at Chicago that had been standing there since March 15th some of them.

Q. A great deal of this rotted fruit results from that, doesn't it?

A. Yes, sir.

Q. It does not result from the delay in transit, but from lying upon your tracks at the eastern destination. Isn't that so?

A. *Yes, sir; my experience is the delay of unloading at destination is greater than the delay in transit over our lines to Chicago.*"

Mr. Sproule says at page 291:

"Q. The testimony has shown that the time of fruit cars in transit between Cali-

fornia and eastern points has been longer during the past year than in former years. How do you account for that, or isn't that true?

A. On some shipments that is true. The time last year was not up to standard. While a great many cars did get through on time, a great many others did not. That was because of congested conditions in the traffic of the country generally. The congestion occurred chiefly east of our rails, and although the time made was not the time that we would wish that fruit had been given, and that we aimed to give, it was the best that could be obtained under the traffic conditions that prevailed in the country at the time of movement, and was better than the time made on any other class of freight. In other words, the oranges during their movement last season, even under those conditions, received preferred attention."

At page 911 of the Record, Mr. Chambers says:

"Q. Mr. Chambers, I want to ask you one more question: The testimony of a good many witnesses is to the effect that upon the going into use of this routing practice, there was immediately a decline in the efficiency

of the service. There were delays of citrus fruit shipments. What do you know about that? Most of the witnesses putting the cause of the delay at this routing practice of yours?

A. I could not say as to the service right after the routing went into effect, whether it was any different from that previous. But the routing I know didn't have any effect on our service in any way at all.

Q. If there was any delay after 1900—

A. It was from other causes.

Q. What would they be—what conditions existed which would serve as causes?

A. Well, the large volume of business. I think the year that the initial carriers took the routing was the largest shipment that up to that time had been made of citrus shipments eastbound.

Q. Yes. And was it still larger than the following year?

A. I think it was. I dont remember."

The slight delay of a day or two in transit loses some of its importance when it is remembered that oranges keep from three to five weeks after they are received at destination (Record, p. 858).

The orange growers and shippers themselves

admit that there has been great congestion of the railroads since 1900.

Mr. James Mills, an orange grower, says at page 226:

> " * * * I realize too that the immense volume of business that has been done has congested to a large extent the railroad lines. It is only a question whether the railroads will equip themselves for what they can see will be necessary to bring our fruit to the market."

It would seem therefore that the delay of a day or two in the delivery of oranges at Eastern points is in no way related to the adoption by the carrier of the routing rule, but is caused by the congestion over all railroads in the country resulting from the great volume of business which is now carried. The unimportance of such delay in transit is certainly emphasized by the fact that three times as much delay per car results from the shippers failing to give orders as to diversions and unloading. The delay resulting from congestion of traffic amounts to about two days, the delay from causes controlled entirely by shippers is over six days per car. It therefore appears that the delay in transit not only is in no way

connected with the routing rule, but even if it was, would be a matter of no real importance to the shipper.

There seems to be absolutely nothing in the suggestion that the shipper is compelled to send his oranges over insolvent lines. In the first place, there have been no insolvent lines in the United States since the routing order went into effect, and if by any chance there are any, they are not used in routing the oranges. As to this, Mr. Chambers says at page 896:

> "Q. It has been suggested in the report of the commission that under the present order the shipper is compelled to send over insolvent lines, and that he does not have good settlements made for delays and losses. What do you know about that?
>
> A. I don't know of any insolvent lines that we send business over.
>
> Q. Do you use your power in routing to compel the companies to settle just claims?
>
> A. We do. I can say that we don't have much trouble in getting a connection to settle a claim that has merit, any claim that we would pay ourselves. I have never found any trouble in getting our connections to take the same view of it we do."

Mr. Sproule, at page 923 of the Record, says:

"Q. Some question has been suggested here as to the matter of good faith. Was there any time, since the first of January, 1900, when as a part of its system of routing the Southern Pacific Company sent any citrus fruit cars over impracticable or insolvent routes?

A. Well, I don't know of any insolvent routes, and we would not intentionally send any fruit over impracticable routes. Our own interest in the traffic would suffice to prevent that, and our own liability in the second place. * * *

(Record, p. 924) Q. What I have more particularly in mind is this: Have you selected, in routing this citrus fruit, roundabout routes as against one shipper, and more serviceable routes and more expeditious routes in favor of another shipper, operating a discrimination and prejudice?

A. No, sir.

Q. Has that sort of thing occurred?

A. No, sir. And if it appeared that such a thing were done it would go hard with the officer that undertook it. To begin with, it would be a very unwise thing. In the next place, I don't know what would be the incentive for it. And in the third

> place, it is not a thing that could be done without the immediate knowledge of the public and of the people affected; and it is a thing that is easily demonstrable. But there is no discrimination whatever as between individuals or shipping companies or destinations."

There is no delay on the part of the initial carriers in informing shippers as to the route over which their oranges have gone forward, and they are always advised on this point on the day of shipment, or on the following day.

L. G. C. Spruance, examined on behalf of the complainant, says at page 170:

> "Q. Do you know then of your own knowledge, over what lines your cars go when they leave here for eastern points?
>
> A. The railroads, I believe, will furnish us with the routing after the cars have left."

Mr. McLeod says at page 172:

> "Q. Do you know what lines of road your shipments go over?
>
> A. We usually know; that is, we found out the second day. We don't know the date it goes out, only we know this: If it is a Southern Pacific car the agent notifies us

that it is a Southern Pacific car and it must go Southern Pacific."

Mr. A. G. Stearns, a witness in behalf of the complainant, says at page 256 that

"* * * the Santa Fe nearly always put their routing on the bill of lading and issued us the bill of lading the same day that the cars were shipped or the next morning."

Mr. James A. Everest testifies at page 275:

"Q. Now then, after the railroad companies had assumed control of the routing, the initial companies, as a general proposition you would know in a day or two the route that your car was taking, would you not?

A. Why, when I put in my bill of lading, when I obtained my bill of lading, as a general rule the routing was in the bill of lading."

At page 840 of the record Mr. Fay testifies as follows:

"MR. STEVENS: You knew the routing that the shipment would take just as if you routed it yourself?

MR. FAY: Not at all, the car had gone out.

MR. STEVENS: I mean as soon as the car had gone out—how soon was it afterwards?

MR. FAY. As soon as we asked for it.

MR. STEVENS: Whenever that information was asked it was cheerfully given you, was it not?

MR. FAY: So far as the Santa Fe was concerned.

MR. STEVENS: That has always been true, has it not?

MR. FAY: Yes, sir."

The routing by the initial carriers since January 1, 1900, has not affected in any way the interests of the shippers. They have every privilege granted to them that they had before, and as we have said before in this brief, it is not conceivable how a shipper can have any further interest in the routing, than to determine himself what cities his car of oranges shall go through, what line shall make the terminal delivery, and where and when the car shall be diverted from its original destination to some point where the shipper thinks he can get a better market.

The testimony, however, shows that not only has the shipper the same privileges while the

carrier exercises the right of routing as he had before, but that the request by the shipper to have his oranges routed by any particular line has invariably been acceded to.

On pages 410 to pages 436 of the record, there are at least a dozen or more specific instances given of requests made by shippers to have their business go over a particular route, and in every case, the routing was granted.

The shippers themselves also agree that requests for routing were almost always granted by the railroads. Upon this point, Mr. McLeod says at page 250, as follows:

> "They have permitted us to request such routes. They did that ever since the first—after the first month I think, when the routings were changed. After that they have said, 'If you will send in a separate slip and say you request such and such routings', generally they would give it to us. Sometimes they wouldn't."

Mr. Fay, a witness for the complainant, says at page 840:

> "MR. HUNSAKER: Have you insisted on giving the railroad the routing which you requested beyond the line of the initial carrier?

MR. FAY: In most cases we have made a request for routing; yes, sir.

MR. HUNSAKER: Has that been regarded or not?

MR. FAY: In many cases, yes.

MR. HUNSAKER: In others it has not?

MR. FAY: In other instances they have not respected our request.

MR. STEVENS: Is it not true that so far as the Santa Fe is concerned, that your suggestions in regard to routing have been followed, without conceding your right to make them?

Mr. FAY: Not in every instance.

MR. STEVENS: Has not that generally been true?

MR. FAY: Generally; yes, sir."

Mr. E. S. Moulton, a packer and shipper of oranges, says at page 859 of the record as follows:

"Q. *Referring to the Santa Fe road particularly, how many times have you asked a route that you have not gotten it?*

A. *I don't recall at present a single time that we have asked for a routing and did not get it.* * * *

Q. *Now, I wish you would please tell me what particular routing you asked that was not accorded to you?*

A. I don't recall any.

MR. HERRIN: *Did you always get the routing that you asked for?*

A. *Yes, sir.*"

It therefore appears that there was no advantage whatever to the shipper in having the routing, except in the rebates which they obtained by selling such right prior to January, 1900. This is substantially admitted by the president of one of the complainants, Mr. Naftzger, who testifies at pages 813, 814, of the Record, as follows:

> "COMMISSIONER CLEMENTS: What advantage was there in routing then, in having any option about the routing then, if you did not get any advantage in rate or rebate?
>
> MR. NAFTZGER: Except as I have already said; it was an advantage to have shipments go over lines that would pay a cent a mile each way, instead of over roads that would pay three-fourths of a cent a mile each way.
>
> COMMISSIONER CLEMENTS: That was the same thing as rebates or commissions?"

It is therefore difficult to see in what way the

shipper has been harmed by the adoption of the routing rule by the appellants. He has everything now that he had before January 1, 1900, and he also has the privilege of routing if he chooses to ask it, as it is invariably given on request by the railroad company, with the reservation that it is given not as a right but as a privilege. It is therefore apparent that if this exercise of the right of routing is not a violation of the Act for the reason given by the Commission, or for the reason given by the court below, there can be no other ground suggested for so holding. We therefore come back to the proposition with which we started, viz., that the initial carrier has the right at common law to select the route over which it shall carry freight beyond its own terminal and that such right is not taken from it by any provision of the Interstate Commerce Act, and that it is impossible to claim that the offer by appellants to carry freight beyond their own terminals, if they may have the routing of it, is a pooling combination between the eastern lines or between the appellants and the eastern lines or results in any prejudice or disadvantage to the orange shipper.

We state again the position of the appellants as follows:

FIRST. A joint tariff is a matter solely of private arrangement between the railroads entering into it and its terms and conditions are for them alone to determine.

SECOND. The making of a joint tariff by connecting roads cannot be compelled and no control of any joint tariff is placed in the Commission by the Interstate Commerce Act beyond the power given it by the 6th Section to compel the filing thereof, when made, and requiring that it shall not be changed except upon notice.

THIRD. The condition of the joint tariff in the case at bar agreed upon between the parties thereto was that the initial carriers should have the right of routing.

FOURTH. One of the important considerations of the contract of transportation between appellants and shipper was that the former should have the right of routing the oranges beyond their own terminals.

FIFTH. Such a contract between carrier and shipper could have been made at common law and there is no direct or indirect prohibition against it in the Interstate Commerce Act.

SIXTH. The general provisions of the Act as to giving "undue or unreasonable preference or advantage," or as to subjecting to "undue or unreasonable prejudice or disadvantage" have no application, as there is no evidence in the record to support the claim that any shipper was prejudiced or given any preference by the exercise of the right of routing. On the contrary the evidence is that shipments of oranges were given the right of way over all other freight and that the same rights were accorded to all orange shippers alike.

SEVENTH. The record contains no evidence whatever to sustain the contention that the condition of the joint tariff as to routing was a traffic pool as held by the court below.

EIGHTH. Before the joint tariffs containing the clause as to routing by the initial carrier were filed, shippers did not exercise the right of routing, but sold such right for the largest rebate they could obtain from the private car lines.

NINTH. The routing clause in the joint tariffs was agreed to by the carriers for the purpose of destroying the practice of giving rebates by the Eastern lines through the private car lines to the shippers and thereby creating an

undue preference to one shipper as against another, and the rebate practice was broken up by the adoption of the routing rule.

TENTH. The complainants in this case before the Interstate Commerce Commission had received large rebates prior to the routing of the oranges by the appellants, one of them having received $175,000 in four years, and the loss of such rebates was the reason for the institution of these proceedings.

THIRD POINT.

The judgment of the court below should be reversed.

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